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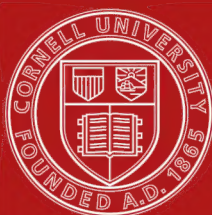
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SELECT CASES

ON

THE LAW OF EVIDENCE

AS APPLIED DURING

THE EXAMINATION OF WITNESSES.

WITH NOTES.

BY

AUSTIN ABBOTT, LL.D.,

Dean of the New York University Law School ; Author of "Trial Evidence,"
"New York Digest," &c.

"Rules of Evidence are rules of Law, and their observance can no more be dispensed with than any other rules of law. Whatever may be imagined to the contrary, it will commonly be found that a disregard of the ordinary rules of evidence is but the harbinger of injustice"—DANIEL WEBSTER.

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PREFACE.

In this volume I have brought together the leading authorities that now define our practice in the examination of witnesses. I have arranged them so that the reader perusing them in order will find the law systematically developed in groups of doctrines easy to be understood and remembered when their relation is thus made visible.

Every attorney is becoming familiar with the disposition of appellate courts to press with increasing strictness the necessity of clearness and precision in framing the questions put on the trial so as to bring out legal evidence without drawing improper and prejudicial statements before the jury ; while at the same time they require with the like increasing strictness, that objections be so specifically stated in the trial court, as to enable the judge clearly to understand the ground, and the adverse counsel to change his question or his offer so as to obviate the objection if it be one which can be obviated.

In the selection of cases I have had in view the great practical importance of promoting regularity in the trial court, in these respects ; and (except in a few cases where it has seemed unnecessary) I have prefixed to the opinion, as reported in the books, a statement from the record, which I have examined for the purpose, of the facts material to the point of evidence, and the colloquy between judge, counsel, and witness, at the trial, to enable the reader to see the exact line of discrimination which the appellate courts have drawn between obscurity and clearness in question and objection.

I trust that this volume will be useful both to the bench and to the bar in aiding, alike, to avoid mistake and error, and to secure efficacious objections such as will preserve to the unsuccessful party his rights on appeal.

I believe that nothing could be more advantageous to the profession than a better common understanding of the rules of forensic contest, so that less time may be lost and fewer disappointments incurred by fruitless controversy upon questions of irregularity, and less prejudice to litigants by erroneous procedure.

AUSTIN ABBOTT.

WASHINGTON SQUARE, New York City,
October 3, 1894.

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Note on Mode of Administering Oath.

MODE OF ADMINISTERING OATH.

The formalities to accompany administration of an oath are usually prescribed by statute.

The New York statute requires the laying of the hand upon and kissing the gospels, unless the affiant desires to dispense with that act of reverence, in which case the formula must be "You do swear in the presence of the ever-living God" while the affiant lifts his hand or not, at his option.*

Where a person declares that he has conscientious scruples against taking an oath or swearing in any form, he may affirm. (For authorities in detail see 1 Abb. New Pr. and F., 230.)

Where he believes in a religion, other than the Christian, he may be sworn according to the peculiar ceremonies, if any, of his religion. *Omi-chund v. Barker*, Willes 238, s. c. 1 Atk., 21 (leading case). It is not necessary that these formalities appear on the record, if it appear that the witness was duly sworn. *Fryatt v. Linds*, 3 Edw., Ch. 239.

Although no witness is to be required to declare his religious belief as a condition of being sworn, this restriction does not prevent the court from asking him what peculiar ceremonies in swearing he deems most obligatory.

Nor does it take away the right of the adverse counsel, on cross-examination, to interrogate the witness as to whether he believes in the existence of a Supreme Being who will punish false swearing; because this and similar inquiries into religious belief must be deemed competent so far as bearing legitimately upon credibility. *Stanbro v. Hopkins*, 28 Barb., 265. For the English rule see *Atty. Gen. v. Bradlaugh*, 14 L. R., Q. B. Div., 667; s. c. 54 L. J., Q. B., 205.

* If there is a departure from the statutory directions (*e. g.*, using hymn book instead of gospels, by mistake, *People v. Cook*, 8 N. Y., 67; omission of the words "in the presence of the ever-living God," *United States v. Baer*, 18 Blatchf. (U. S.), 493; omitting to kiss the book, *Pullen v. Pullen* (N. J.), 4 Atl. Rep., 82), objection must be made at the time, or the irregularity will not necessarily vitiate the oath, 2 Bish. Cr. L., § 1018.

In *Commonwealth v. Keck*, 148 Pa. St., 639; s. c. 24 Atlantic Rep., 161, it was held not error upon a trial for murder to admit the testimony of a witness since deceased, taken upon the preliminary examination of the accused, although upon the preliminary examination the witness was not sworn until his examination had been partly taken where after being sworn he repeated his testimony and upon the trial no part of the testimony taken prior to the oath was admitted in evidence.

Seeley v. Engell, 13 N. Y., 542.

SEELEY v. ENGELL.

New York Court of Appeals, 1856.

[Reported in 13 N. Y., 542.]

A party who objects to a witness of his adversary on the ground of incompetency has, at common law, a right to examine him on the *voir dire* as to competency before he is sworn in chief.

It seems also that he has a right to give other evidence of incompetency before the witness can be sworn in chief.

By the present practice, the question of competency is determined after the witness is sworn in chief; and whenever it first appears that he is incompetent, the objection may be taken and the testimony struck out.

It seems, however, that there are still cases in which it may be expedient to examine on the *voir dire*. For instance, if the interest arises upon written documents with which the witness is cognizant, but which are not present, their contents may be sworn by oral testimony on the *voir dire*, but not after the witness has been sworn in chief.*

George S. Seeley sued on two promissory notes made by defendant, one for \$91.39 (on which defendant had paid \$58.32) and the other for \$8.62; the note for \$91.39 being payable to Nehemiah Seeley or bearer; the other to one Simmon or bearer.

The complaint, after pleading the notes and payment, alleged that the plaintiff at the commencement of the action, was owner and holder of the same, and demanded judgment for \$54.62.

The answer took issue on plaintiff's ownership and defendant's indebtedness; and also alleged mistake in the making of the larger note for too much and claimed that in consequence there remained after the payment on account, nothing due.

At the trial before a referee, plaintiff, after reading the notes in evidence and giving evidence of title and of computation of interest, called Losina Seeley, proposing to have her sworn as a witness.

* The better opinion is that the ground of the right to give oral evidence of the contents of a writing without accounting for the absence of the writing, where the object is to show incompetency of the witness is not the technical or formal point that the witness has not been sworn in chief, but the substantial point that the object is not to prove a fact in issue directly or indirectly, but only a matter collaterally in question. See, for instance, *Klein v. Russell*, 19 Wall., 439, 464; *Kalk v. Fielding*, 50 Wisc., 339.

Seeley v Engell, 13 N. Y., 542.

Defendant's counsel requested plaintiff's counsel to state whether she was or was not the wife of Nehemiah, the payee in the larger note.

Plaintiff's counsel refused to do so.

Defendant's counsel then requested the referee to require him to disclose the fact in that respect. The referee ruled that he could not require any such disclosure.

Defendant's counsel then objected to her as incompetent, being the wife of the real plaintiff in interest, and requested the referee to administer to her, on behalf of defendant, the preliminary oath called the *voir dire*, that she might be examined thereon to ascertain whether she was disqualified as a witness for the plaintiff.

The plaintiff's counsel objected and the referee ruled and decided that he would not administer such oath, but would swear her in chief and if, upon her examination, her incompetency appeared, he would strike out her testimony. Exception taken.

The witness, being then sworn in chief, testified that she was the wife of Nehemiah Seeley; and against defendant's objection, she was held competent, exception taken, to give evidence of her husband's transfer of the note to the plaintiff before commencement of the action.

Defendant's counsel offered, for the purpose of sustaining the ground of his objection, to prove that the husband of the witness was the real owner of the note, and that the suit was brought for his benefit. The referee ruled that such evidence was not in order at that stage of the proceedings; that plaintiff might go on with the examination and he would hear such evidence of defendant afterwards. Exception taken.

Judgment was entered for plaintiff on the report of the *referee*.

James E. Dewey, for appellant, conceded it was within the referee's discretion to refuse to require disclosure; but urged that his ruling that he had no discretion, was reversible error.

Also that defendant had a right, *before* a witness could be examined in chief, to examine as to competency, and to call other witnesses to prove incompetency; and the right to examine

Seeley v. Engell, 13 N. Y., 542.

the witness on the *voir dire* had not been abolished, but only the strict rule that if that right was not exercised, the right to object for incompetency was waived.

De Witt C. Bates, for respondent, claimed that the witness was competent.

The General Term affirmed the judgment.

They were of opinion "that it is entirely a matter of discretion whether the preliminary oath, as to interest, or the oath in chief, shall be administered;" and that the better practice of recent times is "to swear the witness offered in chief, and bring out the facts sought to be established to prove the interest on either direct or cross-examination" [citing 1 Phil. Ev., 267]. They also considered that no injury resulted to defendant from the ruling, because in their view of the law, the witness was competent.

The Court of Appeals reversed the judgment.

DENIO, Ch. J.—The determination of this case involved two questions: first, whether the defendant was entitled to go into a preliminary inquiry to ascertain whether the witness, Mrs. Seeley, was competent to testify for the plaintiff upon the issue, before she was sworn in chief; and, secondly, whether the defendant was entitled, under the pleadings, to go into evidence to show that the note of \$91.39 was given under a mistake of fact. On both points the referee ruled against the defendant, and in both instances he was, in my opinion, wrong.

I.—The point upon which the defendant objected against Mrs. Seeley as a witness was, that she was the wife of Nehemiah Seeley, and that the said Nehemiah was the party for whose immediate benefit the suit was prosecuted. The objection was not put in these precise words, but that was the effect of it. The case states that the defendant insisted that she was "the wife of the real plaintiff in interest." The defendant asked that she might be sworn on her *voir dire*. This was refused; and after it had appeared by her examination in chief that she was N. Seeley's wife, the defendant offered to prove that N. Seeley was the real owner of the note, and that the suit was brought for his sole benefit. This the referee refused, and he persisted in allow-

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ing the plaintiff to examine Mrs. Seeley in chief before the question was determined whether she was a competent witness or not. If the defendant's position had been limited to the allegation that the witness was N. Seeley's wife, then, inasmuch as she admitted that fact on the plaintiff's examination, immediately after being sworn in chief, and the defendant was allowed an opportunity of objecting to her further examination, and did object, and the question arising upon that objection was correctly determined as the case then stood, no prejudice would have arisen out of the refusal to administer the preliminary oath, and the judgment should not be disturbed for that reason. But it was a part of the defendant's objection that N. Seeley was the real plaintiff, and this the defendant offered to prove, first by the preliminary examination of the witness on the *voir dire*, and, when that was refused, by other witnesses. This request, in both forms, was denied to him. The referee ruled, in effect, that she should be examined in the first instance by the plaintiff, on the merits, after which she might be examined by the defendant's counsel as to her competency. This was inverting the regular order of proceeding, and was obviously incorrect.

Previous to the witness being sworn, it is competent for the counsel for the party against whom he is called to have him examined on the *voir dire*, in order to ascertain whether he is competent to testify (Stephens' N. P., 1731, 1769; C. & Hill's Notes, 257). This well settled rule has not been departed from, as the opinion in the Supreme Court intimates, in modern cases. The principle, in respect to which the rigor of the ancient practice has been relaxed, is the one which precluded the party who had suffered an adverse witness to be sworn in chief from afterwards objecting to his competency on the ground of interest, though such interest should appear in the course of the examination in chief. At present, if it appear at any time during the examination of the witness that he is incompetent, the objection may be taken, and the testimony will be expunged (1 Phil. Ev., 267; Jacobs v. Layborn, 11 Mees. and Welsb., 685). But there are still cases in which it may be expedient for a party to put an adverse witness on the *voir dire*. For instance, if the interest arises upon written documents, with which the witness is cogni-

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zant, but which are not present, their contents may be shown by parol upon the preliminary examination, but not after the witness has been sworn in chief (1 Phil. Ev., *id.*; Cow. and Hill's Notes, 709). The tenacity with which the old rule has been adhered to, even in modern times, is strikingly shown in a curious case in the English Court of Exchequer, decided in 1839. In an action on a bill of exchange, the plaintiff put a witness upon the stand whom he called *James Dewdney*. After he had been examined, without objection, it was ascertained that he was really *George Dewdney*, the plaintiff in the suit. The defendant offered to call witnesses to that fact, but on an objection that it was not one of the issues to be tried, the evidence was excluded, and the plaintiff had a verdict. On a motion for a new trial the court said: "The regular way, although in some instances the strict course may have been improperly departed from, was for you to make this objection on the *voir dire*, when other evidence might have been called, if necessary, to prove the incompetency, and then, if the incompetency were established, an opportunity would be afforded to the plaintiff of proving his case by other evidence" (*Dewdney v. Palmer*, 4 Mees. and Welsb., 664). I do not say this is a case suitable to be followed by us, and it will presently be seen that it has been overruled in the court in which it was decided. But it shows plainly enough that the rule permitting, at least, the examination of a person called as a witness on his *voir dire*, when the right is claimed by the adverse party, is not abolished in England. The effect of neglecting to insist on the preliminary oath was carefully examined in *Jacobs v. Layborn*, *supra*, where the interest was first discovered in the course of the examination, after the witness had been sworn in chief. It was held, notwithstanding the decision in *Dewdney v. Palmer*, not to be too late to object; but there was not in that case, or in any one which I have been able to find, an intimation that the right to the preliminary examination, when insisted on, could be denied. I conclude, therefore, that the referee fell into an error in refusing to permit the witness to be examined on the *voir dire*.

[*The ruling as to mistake is here omitted.*]

Judgment reversed.

Loveridge v. Hill, 96 N. Y., 222.

LOVERIDGE v. HILL.

New York Court of Appeals, 1884.

[Reported in 96 N. Y., 222.]

Counsel is not bound to interrupt his adversary's direct examination of a witness on a material point, because of mere suspicion that the witness may be incompetent to testify to it.* He may await his opportunity to bring out on cross-examination the facts on which the question of competency depends, and if it thereby appears that the witness is incompetent, may then move to have the incompetent testimony expunged.†

A material question on the trial was whether the promissory note on which plaintiff sued had been transferred to Mrs. Loveridge, the plaintiff, by one Milo W. Hill as security for costs in a mortgage suit, as claimed by the plaintiff, or to Mr. Loveridge, the plaintiff's husband, as indemnity against his liability as bail in certain contempt proceedings, as claimed by defendant.

Upon this issue a Mr. Perkins, an attorney, was called as a witness for the plaintiff, who after stating that he was counsel for Mrs. Loveridge in the suit against her and Milo W. Hill to set aside the mortgage, and had been counsel for Milo W. Hill in various suits and remembered the appeal in the mortgage suit, testified: "I heard Milo W. Hill say that he had secured or satisfied the Loveridges against costs," referring as the context shows, to the costs in the mortgage litigation. On cross-examination the witness said: "Whatever I have sworn to in this case as coming from Dr. Hill was learned by me as counsel."

The defendant's counsel then asked that the evidence of the witness upon the subject, be struck out "upon the ground that he simply testified to matters which came to his knowledge as counsel, and the same was privileged."

The plaintiff objected generally.

The referee denied the motion and defendant excepted.

Judgment was entered for the plaintiff upon the report of a referee.

* Compare *Gregory v. Fichtner*, p. 362 of this vol., and note at p. 367.

† In practice testimony thus struck out is not omitted from the minutes. It is disregarded by the referee or jury, but remains in the minutes in order that if appeal be taken the Appellate Court may review the ruling.

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The Supreme Court at General Term affirmed the judgment on the ground that the "evidence was not objected to until after it had been taken. The motion to strike out was, therefore, too late."

The Court of Appeals reversed the judgment. The Court say [*after stating the facts*]: We think the rule which requires a party to object to incompetent evidence when offered, and which precludes him from waiting until he can see, after the evidence is in, whether it is damaging or not before taking his ground, was misapplied in this case. It did not appear when the objectionable evidence was given that the declaration testified to by Mr. Perkins was made to him as counsel for Hill, or while the relation of attorney and counsel existed between them. This testimony followed the statement that the witness was counsel for Mrs. Loveridge in the suit against her and Hill. The declaration related to that matter, and as the case stood when the declaration was proved, it was not an unreasonable inference that it was made to the witness as counsel for Mrs. Loveridge. It is true the witness testified that he had been counsel for Hill in various suits, but when that relation commenced, or whether it existed when the declaration was made, did not appear. This was first disclosed on the cross-examination, and the motion to strike out followed immediately upon the disclosure.

The most that can be claimed is that the evidence on the direct examination might have suggested to counsel a quære as to the existence of the relation at that time, and whether the communication was privileged. But it would be too strict to hold that a party is bound to interrupt the examination of a witness in respect to a material matter on a mere suspicion that the witness may be debarred by his position from testifying. He may, we think, await his opportunity on cross-examination to bring out the facts, and, if on such examination it appears that the witness is incompetent, make his motion to have the testimony expunged from the record. (*Hinckley v. N. Y. C. & H. R. R. Co.*, 56 N. Y., 429.)

We think the motion to strike out should have been granted, and as the error cannot be said to have been innoxious we feel compelled to reverse the judgment.

All the judges concurred.

Judgment reversed.

Note on What Law Governs Evidence.

NOTE ON WHAT LAW GOVERNS EVIDENCE AS
TO COMPETENCY.

As to time.—The law in force at the time the witness is examined determines his competency.

The fact that the communication as to which he is interrogated was privileged and incompetent at the time when it was made, and even at the time when the action was commenced, does not prevent the application of the rule of competency existing at the time of receiving the testimony at the trial, unless the statute is so expressed as to prevent it. *Southwick v. Southwick*, 49 N. Y., 510; *Comins v. Hetfield*, 80 N. Y., 261.

As to place.—The law of the place of the jurisdiction of the court determines the question of the competency of evidence; and testimony incompetent by that law must be excluded, although it was competent at the place where the testimony was taken by deposition or by the law of the place where the contract was made.

King v. Worthington, 104 U. S., 44.

KING v. WORTHINGTON.

Supreme Court of the United States, 1881.

[Reported in 104 U. S., 44.]

In case of a conflict between the state and federal law as to competency of witnesses, the latter must govern in a federal court.

Where a cause has been removed from a state to a federal court, the fact that while pending in the state court, a witness was held by that court to be incompetent under the state law, does not affect his competency to testify in the cause after its removal to the federal court.

Suit in equity to remove a cloud from title. The suit was originally brought in an Illinois court, and while pending there, certain witnesses were, under the law of Illinois, declared incompetent, and their depositions held inadmissible. The cause was afterward removed to the United States Circuit Court, and there the depositions were admitted; and decree was made in favor of complainant.

The defendants appealed from the decree of the Circuit Court.

The Supreme Court affirmed the decree, Woods, J. [*After considering the regularity of the removal*]: The next ground of error assigned is that the Circuit Court admitted in evidence the depositions of Scott, Weeks, Bartholomew and Hinckley.

It is perfectly clear, that under the act of congress (Rev. Stat., sect. 858), the persons named were competent witnesses in that court. This point has been expressly ruled by this court in the case of *Potter v. Nat. Bk.* (102 U. S., 163), brought up on error from the Northern District of Illinois. It was also held, in the same case, that, where there was a conflict between the act of congress and the law of the state in regard to the competency of witnesses, the United States court was bound to follow the act of congress. The question is, therefore, reduced to this: Does the fact that while the case was pending in the state court, these witnesses were held by that court to be incompetent under the state law, preclude them from testifying in the case after its removal to the United States court? We think this question must be answered in the negative.

The federal court was bound to administer the law of evi-

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dence as prescribed by act of congress, unless what had transpired in the state court, presented an insuperable obstacle to that course. This the appellants claim was the fact. They say that the transfer of a case from the state to a federal court does not vacate what has been done in the state court previously to removal; that what has been decided in the state court is *res judicata*, and cannot be re-examined. In support of this position *Duncan v. Gegan* (101 U. S., 810), and other cases are cited. The law as settled by this court is correctly stated by appellants. But the rulings of the Circuit Court in the progress of the cause after its removal did not reverse or vacate anything which had previously been adjudicated by the state court. The decision of the latter court was that, under the state law, certain witnesses were incompetent in the state court. The federal court decided that, under the laws of the United States, the same witnesses were competent when offered in a United States court. Here is no conflict of opinion, and no unsettling of any matter which had been adjudged by the state court. The federal court was bound to deal with the case according to the rules of practice and evidence prescribed by the acts of congress. If the case is properly removed, the party removing it is entitled to any advantage, which the practice and jurisprudence of the federal court give him.

In this instance the court below followed the law of evidence as prescribed by congress. In doing so, it did not reverse any ruling of the state court, and, we think, committed no error.

NOTE.—U. S. R. S. § 858, does not exclude one who is interested in the issue, if he is not technically a party on the issue. *Potter v. National Bank*, 102 U. S., 163.

Even though an executor or administrator is a party, if the only judgment, which might be recovered against him, would be against him merely as legatee or devisee the proviso in U. S. R. S. § 858, does not apply. *Goodwin v. Fox*, 129 U. S., 601, 631.

Nor will the court extend the proviso by analogy to actions by or against other representative parties such as an assignee in bankruptcy. *Hobbs v. McLean*, 117 U. S., 567, 579.

Beal v. Finch, 11 N. Y., 128.

BEAL v. FINCH.

New York Court of Appeals, 1854.

[Reported in 11 N. Y. 128.]

In an action against two or more, each defendant is a competent witness for his co-defendant. *

A witness competent to testify as to some matters, and not as to others, is not to be excluded; but improper evidence only is to be excluded by objection to improper questions when asked.

It seems that a party having a witness on the stand may be called upon by his adversary to state what he proposes to prove.

Action against several defendants for assault and battery.

The defendants put in separate answers, severally denying the allegations of the complaint.

On the trial at Circuit defendant's counsel offered McKennon, one of the defendants, as a witness on behalf of other defendants.

Plaintiff's counsel objected on the ground that the offered witness was one of the defendants in the action.

The court sustained the objection, and refused to allow the offered witness to be sworn. Exception was taken.

Defendants' counsel then separately offered each of the other defendants (with one exception), as a witness for his co-defendants. Same objection, ruling and exception.

Verdict for plaintiff against five of the defendants; the verdict stating that the jury "assess the damages jointly at \$85."

Judgment was thereupon entered "that the plaintiff recover against the said [*five named defendants*], the said sum of eighty-five dollars, with " etc., costs.

The General Term affirmed the judgment without opinion.

A. & R. Parker, for appellants, urged that the exclusion was simply on the ground that the offered witness was a defendant; and not because of any evidence that there was a joint assault.

Moreover, separate actions might have been brought, and as the defendants answered separately, the judgment should not be deemed joint.

* At the time of this decision the incompetency of a party to testify on his own behalf had not been removed, as it since has been. N. Y. Code Civ. Pro., § 828.

Beal v. Finch, 11 N. Y., 128.

Sayre & Banks, for respondent, insisted that defendants were "jointly" liable.

The Court of Appeals reversed the judgment.

PARKER, J. [*after discussing the question of the competency of a defendant as a witness for a co-defendant, under the then existing law*]:

In every action for assault and battery, and in all other cases of tort, a verdict and judgment may be rendered in favor of one and against another defendant; that is, in the language of the act, a verdict or judgment separate and not joint, may be rendered. In such an action then, a party may be examined for his co-defendant, *as to any matter* as to which a separate and not joint verdict or judgment can be rendered, and *as to any matter* in which he is not jointly interested or liable with such co-defendant. In all actions a defendant is a competent witness for his co-defendant. His admissibility as a witness cannot be questioned, but he is restricted as to the subject matter of his examination. If any question be asked, tending to establish a defense of which the co-defendant cannot separately avail himself, the plaintiff is at liberty to object, and the court must exclude it. Where a witness is called to the stand, who is competent to be sworn and to testify to some matters, but who may not speak of other matters, it is not proper to object to his competency generally, and exclude him. It will not be presumed, that an improper question will be asked him. It is only by objecting to improper questions, when asked, that a party can exclude improper evidence. A party, having a witness on the stand, may be called upon by his adversary to state what he proposes to prove, and in that case he must state it.* But he need make no such statement, unless called upon to do so. It is enough for him to proceed and put his questions to the witness, unless desired to state what he expects to prove.

There are many things which the witness excluded in this case might have proved, that would have constituted a separate defense for the other defendants, and as to which the witness had no interest. He might have proved the other defendants

* Provided the court require a disclosure (see next case).

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were not present or took no part in the rencontre, or that the plaintiff struck first, and that they acted only in self defense. Any of these matters would constitute an entire and perfect defense for the other defendants for whom he would have testified, and would have been entirely distinct and separate from the defense of the witness.

[*Discussion as to what matters the co-defendant could prove under the law at that time, is here omitted.*]

Judgment reversed.

Note on Competency of the Accused.

NOTE ON COMPETENCY OF THE ACCUSED IN A
CRIMINAL CASE.

Accused as a witness—Competency.—Under the present statutes of nearly all the states, and of the United States, the accused may in all cases testify as a witness in his own behalf, but his neglect or refusal to testify does not create any presumption against him. In the absence of such statute the accused is absolutely incompetent.

(See Abbott's Criminal Brief, p. 218, §387, where the statutes of all the states are collected and the resulting rules as to the right of the accused to be examined by his counsel and to answer as to his intent; and as to his liability to cross-examination, within the limits of the direct, or as to his own character, or on the case at large, are fully stated.)

People v. Tice, 131 N. Y., 651.

PEOPLE v. TICE.

New York Court of Appeals, 1892.

[Reported in 131 N.Y., 651.]

Under a statute which like that of New York allows the accused to testify as a witness in his own behalf—without anything to imply restriction of the right of cross-examination—the accused, by becoming a witness in his own behalf and testifying on any point whatever, makes himself liable to cross-examination not only on the same point, but also at large in support of the case of the prosecution, and also to test his character as a witness.

Whether to restrict such cross-examination within narrower limits than if he were an ordinary witness, is in the discretion of the trial judge. It is the common practice in New York to allow cross-examination at large at the same time as strict cross-examination.

Defendant having been convicted at Oyer and Terminer of murder, appealed.

At the trial he was called and sworn as a witness in his own behalf, and his examination in chief was confined to questions calling for his age, nativity, place of birth, and the fact that he served as a soldier in the war of the rebellion, having enlisted twice, and that he was honorably discharged.

The public prosecutor then proceeded to cross-examine him, and was permitted, under objection, to ask a variety of questions: *First*, questions relating to events in his life, with the dates and places, when and where they occurred, not disparaging in their character, but which served to illustrate and test the memory of the defendant; and *second*, questions bearing upon some of the facts brought out in the course of the trial. For instance, the prosecutor asked him whether he ground a knife the day before the homicide, and whether he had asked his wife several times to live with him, and whether he saw her on Friday, and to this question he replied that he did, and that “she insulted him and used very bad language.”

The Supreme Court affirmed the conviction.

The Court of Appeals affirmed the judgment of the Supreme Court.

ANDREWS, J. [*after passing on another point*]: These questions had no relation to the facts brought out in defendant's

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examination in chief, nor did the facts elicited affect his credibility ; but they were pertinent to the issue. The questions put to test his memory bore upon the truth of the claim made in his behalf that his disease impaired his faculties, including his memory. The question as to the knife he answered in the negative. His testimony that he saw his wife on Friday and that she abused him, bore on the question of motive. It was competent for the prosecutor to show the state of feeling between the defendant and his wife, and that their relations were hostile. Any circumstances tending to explain the motive for the homicide, or from which the jury might draw the inference that the defendant was prompted by anger or resentment, were admissible.

The objections taken to the questions put to the defendant on cross-examination are based upon the constitutional provision that no person shall be compelled in any criminal case to be a witness against himself. (Const. art. 1, § 6.) This provision was aimed at the practice which in early times prevailed in England and on the continent of Europe, of subjecting accused persons to torture in order to extort confessions of guilt, and the modified practice which prevails in some countries to subject them to judicial examination in the absence of counsel, in order to probe the conscience and induce a statement of criminating facts bearing upon the charge which is the subject of the inquiry. The constitutional provision protects persons charged with crime against such inquisitorial and compulsory proceedings.

Under the rule of the common law an accused person was not permitted to be a witness in his own behalf. The rule has been changed in this and other states, by recent legislation. The law of this state provides that "the defendant (in a criminal case) in all cases may testify as a witness in his own behalf, but his neglect or refusal to testify does not create any presumption against him." (Code Crim. Pro. § 393.) The law so far as it can, protects a defendant who omits to be sworn, from having that fact weigh against him.

In construing this recent legislation there has been much contrariety of decision in different states as to the scope of the right of cross-examination of the accused person who has become a witness under these enabling statutes. In some of the states the

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rule has been adopted that by becoming a witness for himself, he thereby subjects himself to the same rules of examination as any other witness and may be asked any questions on cross-examination or matters pertinent to the issue, or calculated to test his accuracy, veracity or credibility, subject to the power of the court in its discretion to limit and regulate such examination as in cases of other witnesses.

In other states it has been held that the right of cross-examination under these statutes is confined to matters referred to in the examination in chief, and that the witness cannot be required to testify as to other facts material to the issue, or as to events in his life, for the purpose of affecting his credibility or character.

The difference in the decisions in different states are attributable in part to a difference in the language of the statutes. Some of the statutes in terms limit the cross-examination to matters referred to in the examination in chief. In neither of the two classes of decisions is there, we apprehend, any invasion of the constitutional provision referred to. The accused is not compelled to become a witness. When he avails himself of the privilege conferred by the statute, he subjects himself voluntarily to the situation of any other witness, and if he is compelled to answer disparaging questions, or to give evidence relevant to the issue, which is injurious, it is the consequence of an election which he makes to become a witness, which involves a waiver on his part at that time, of the constitutional exemption. If he accepts the privilege given by the statute, he takes it with its attendant dangers. "His own act is the primary cause, and if that is voluntary he has no reason to complain." (CHURCH, Ch. J., in *Connors v. People*, 50 N. Y., 240.)

The principle that an accused person who becomes a witness in his own behalf, thereby places himself in the attitude of any other witness in respect to the right of cross-examination, has been announced in many cases in this court. (*Brandon v. People*, 42 N. Y., 265; *Connors v. People*, *supra*; *Stover v. People*, 56 N. Y., 315; *People v. Casey*, 72 *id.*, 394.)

The same rule has been declared in the courts of Massachusetts, Mainé, New Hampshire and other states, under statutes similar to the statute of this state. (*Com. v. Mullin*, 97 Mass.,

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545; State v. Witham, 72 Me., 531; State v. Ober, 52 N. H., 450.)

The cases in this state were those where exception was taken to rulings permitting questions affecting the credibility or the moral character of the accused. But if the constitutional protection can be interposed at any point in the examination, we do not perceive any logical reason why it may not be invoked to protect the accused against answering questions affecting his credibility, and also to prevent an examination as to relevant facts, or indeed as to any fact, whether pertaining to his testimony in chief or not. This broad view of the scope of the constitutional exemption seems to be the one entertained by Judge COOLEY (Const. Lim., p. 317), but it is not in harmony with the decisions in this state and does not seem to us to be sound in principle. The statute permits the accused to be a witness. This must mean, a witness generally in the cause, and not that he may be a witness as to such matters only as to which he may choose to testify. This being the construction put by our courts upon the statute, there is no constitutional right infringed, if the accused having elected to take the stand as a witness, is subjected to the ordinary rules of examination.

The range and extent of the cross-examination is within the discretion of the trial judge, provided only that it relates to relevant matters or to matters affecting credibility. The trial judge may properly restrict the cross-examination of accused persons within narrower limits than in ordinary cases, but the latitude allowed is a matter for the trial judge.

The questions put to the defendant to test his memory were relevant to his defense of insanity and were plainly competent. The questions tending to show the unpleasant relations between the witness and the deceased at or about the time of the homicide, were relevant on the question of inducement and motive. This was a part of the case of the people, but it is the constant practice in civil and criminal trials to permit the plaintiff or the people to fortify their own case by facts elicited on cross-examination of the witnesses for the defense. The matter is subject to the regulation and discretion of the trial judge.

There was no error, therefore, in permitting these questions

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to be asked. That the answers to the questions respecting the interview between the defendant and his wife on the day preceding the homicide, in fact did him no harm, is evident since the same transaction had been brought out by the defendant's counsel on a prior examination of a witness for the defendant.

There is no ground for interfering with the judgment and it should be affirmed.

All the judges concurred.

Judgment affirmed.

Abolition of Common-law Rule.

NOTE ON INCOMPETENCY IN CIVIL CASES, BE-
CAUSE OF INTEREST.

The interest, which would disqualify one as a witness at common-law, was only a direct and certain interest in the event of the cause, or an interest in the record for the purpose of evidence. The interest in the *event* of the cause might be of three varieties: 1st. Where actual gain or loss would result directly from the verdict and judgment. 2d. Where the situation of the witness was such that a legal right or liability would result directly from the verdict and judgment. 3d. Where the witness would be liable over to the party calling him in respect to some breach of contract or duty on the part of the witness involved in the issue.

An interest in the question as distinguished from an interest in the event of the cause, did not disqualify.

This common-law disqualification of witnesses on account of interest in civil cases has generally been abolished in this country, both in federal and state courts.*

Although this disqualification does not now exist as to his general competency, the question of interest does nevertheless arise in determining a witness' competency to testify on a particular subject—concerning personal transactions or communications with a deceased person or lunatic, as against the executor, administrator or committee of such, or as against one deriving title or interest under such deceased person or lunatic.

[*This existing disqualification will be considered later.* See p. 137.]

*The reinstatement of the disqualification in the U. S. Court of Claims by the enactment of June 25th, 1868 (Rev. Stat., §1079), under which the case of *United States v. Clark* (96 U. S., 37), was decided, has been reconsidered by Congress, and by the Act of March 3d, 1887, the disqualification by interest, again abolished.

Commonwealth v. Lynes.

COMMONWEALTH v. LYNES.

Supreme Court of Massachusetts, 1886.

[Reported in 142 Mass., 577.]

If where it appears to the judge that a child of tender years offered as a witness does not sufficiently understand the nature and obligation of an oath, he may permit the child to be properly instructed for the purpose, if of sufficient age and intellect to be properly instructed.

If at the time of testifying a child sufficiently understands the nature and obligation of an oath, it is not ground of objection to competency that he had been instructed on the point during a recess of the trial.*

On the trial of an indictment, Lillie Lynes (thirteen years of age) was called as a witness for the prosecution; and defendant objected to the administration of the oath to her, on the ground that she was ignorant of the nature and obligation of it, whereupon the presiding judge asked her some questions, to which she replied that she understood that the oath was to tell the truth, and that she would be punished if she did not tell the truth after taking it, but she did not know how or by whom she would be punished. The judge then asked the district attorney if he desired to call her at that time, to which he replied no; whereupon the judge said he would postpone the decision of her competency, and she could be instructed if necessary. The next day she was offered again as a witness, and upon examination was found competent and was permitted to testify, against the objection and exception of the defendant on the ground that it appeared, as it did in her examination, that she had been instructed by a Christian minister since the last adjournment of the court.

On cross-examination, she testified that the minister told her that God would punish her if after taking the oath she testified what was not true; and that she did not know that before.

The *Supreme Court* overruled the exceptions.

*To same effect *McAmore v. Wiley*, 49 Ill. App., 615.

GARDNER, J. [*After stating the facts*]: The practice has not been uniform upon this question. In *Rex v. Williams*, 7 C. & P., 320, the defendant was indicted for the murder of her husband, and her daughter, eight years old, was called as a witness. It appeared that before the death of her father, which took place about sixteen weeks before the trial, the child had never heard of God, or of a future state of rewards and punishments; and that she had never prayed, nor knew the nature of an oath; but that since the death of her father she had been visited twice by a clergyman, who had given her some instruction as to the nature and obligation of an oath. She said she should go to hell if she told a lie, and that hell was under the kitchen gate; but she had still no intelligence as to religion or a future state. Mr. Justice Patterson refused to allow the girl to testify, and stated his reasons therefor, as follows: "I must be satisfied that this child feels the binding obligation of an oath from the general course of her religious education. The effect of the oath upon the conscience of the child should arise from religious feelings of a permanent nature, and not merely from instructions, confined to the nature of an oath, recently communicated to her for the purposes of this trial; and as it appears that, previous to the happening of the circumstances to which this witness comes to speak, she had had no religious education whatever, and had never heard of a future state, and now has no real understanding on the subject, I think that I must reject her testimony." In the course of the trial, the counsel for the king stated that it was every day's practice to put off a trial in order that a witness might be instructed as to the nature of an oath, citing *Rex v. Wade*, Ry. & M., 86. The oath, however, was refused the witness. The reasons first given by the learned justice have been criticised, and have not generally been followed.

In *Regina v. Nicholas*, 2 C. & K. 246, Pollock, C. B., refused to put off the trial in order that a child of six years of age might receive instruction, but said: "There may be cases where the intellect of the child is much more ripened, as in the cases of children of nine, ten or twelve years old, for example, where

their education has been so utterly neglected that they are wholly ignorant on religious subjects. In those cases a postponement of the trial may be very proper; but where the infirmity arises from no neglect, but from the child being too young to be taught, I doubt whether the loss in point of memory would not more than countervail the gain in point of religious education. I lay down no general rule, as there may be cases where a postponement would be proper."

In the English practice, it is usual for the judge to examine an infant as to his competency before going before the grand jury, or before proceeding to trial, and, if found incompetent for want of proper instruction, in his discretion, to put off the trial in order that the infant may, in the meantime, receive such instruction as may qualify him to take an oath. Roscoe *Crim. Ev.* (7th Am. ed.) 114. 3 *Russ. on Crimes* (9th Am. ed.) 612. 1 *Stark Ev.* (4th. ed.) 117. *Rex. v. White*, 1 *Leach*, 430. *Regina v. Milton*, 1r. *Cir. Rep.* 16. *Regina v. Baylis*, 4 *Cox C. C.* 23. The same practice is laid down in 1 *Greenl. Ev.* (14th ed.) § 367. It is left discretionary with the court, when a principal witness offered is not yet sufficiently instructed in the nature of an oath, to put off the trial that this may be done.

The defendant in his bill of exceptions has given us no information as to the moral condition of the witness, before she was called to testify; nor whether she had been instructed in religious knowledge to any extent. We are not informed what her intellect was, nor how far it was ripened. All these considerations were before the judge who examined the witness before and after her instruction. If it had appeared to the presiding judge that the witness did not sufficiently understand the nature and obligation of an oath, we think that it was within his discretion to permit the child to be properly instructed, provided she was of sufficient age and intellect to receive instruction.

But the real question arose at the time when she was called upon to take the oath. The judge must then have been satisfied that the witness at that time understood the nature of an oath, and the solemn responsibility which then rested upon

Commonwealth v. Lynes, 142 Mass., 577.

her to speak the truth.* He was to say whether she understood the sanctity of an oath, so that she could be a witness, and the jury were to determine whether they believed her evidence. *Regina v. Hill*, 5 Cox C. C., 259. *Kendall v. May*, 10 Allen, 59, 64. The question of competency, depending upon the fact in evidence, was to be decided by the court. When, therefore, the judge had examined the witness and found her competent to be sworn, and she was permitted to testify, we think that the defendant could not object upon the ground that she had been instructed by a Christian minister since the last adjournment of the court.

[*Here followed a consideration of other exceptions.*] Exceptions overruled.

* The result of the cases is that the competency of children as witnesses is to be determined, not by their age, but by the degree of their understanding and knowledge.

It is essential that they should possess sufficient intelligence to receive just impressions of the facts respecting which they are examined, sufficient capacity to relate them correctly and sufficient instruction to appreciate the nature and obligation of an oath. *People v. Bernal*, 10 Cal. 66.

Notes of Cases on Competency of Infants.

NEW YORK STATUTE.

Whenever in any criminal proceeding a child actually or apparently under the age of twelve years, offered as a witness, does not, in the opinions of the court or magistrate, understand the nature of an oath, the evidence of such a child may be received, although it is not given under oath, if, in the opinion of the court or magistrate, such child is possessed of sufficient intelligence to justify the reception of the evidence; but no person shall be held or convicted of an offense upon such testimony unsupported by other evidence.

[Added by Chap. 279 of the Laws of 1892 to section 392 of the Code Crim. Pro., which formerly read "The rules of evidence in civil cases are applicable also to criminal cases, except as otherwise provided in this Code."]

NOTES OF CASES ON COMPETENCY OF INFANTS.

The objector is entitled to have the examination made in his presence on the trial before the court. It is error to accept the witness merely on the statement of one of the justices holding the court, that he, the justice, had previously examined the child offered as a witness, and was satisfied of his competency. *People v. McNair*, 21 Wend., 608. NELSON, Ch. J.

In *People v. Findal*, 58 Hun, 482; 35 State Rep., 805; 12 N. Y. Supp., 498, it was held not to be the practice in criminal trials, when a witness incapable of understanding an oath by reason of youth is called by either party to take the unsworn statement of such witness.

In *Taylor v. State* (22 Tex. App., 529, s. c. 3 Southwest. Rep., 753); it was held error in a criminal case where it appeared on *voir dire* that witness did not understand the nature of an oath, for the judge to take the witness into a private room and instruct him.

At what age an examination as to a child's understanding is required before he may be allowed to testify.

Michigan: *Hughes v. Detroit, etc., Ry. Co.*, 1887, 31 Northwest. Rep., 603 (error not to examine as to the competency of a child of seven). *Mis-souri*: *Brashears v. Western Union Tel. Co.*, 45 Mo. App. 433 (Mo., R. S., 1889, § 8925, changes the common law as to presumed incapacity under the age of fourteen to under ten); s. p. *Ridenhour v. Kansas City Cable Ry. Co.*, 102 Mo., 270; s. c. 14 Southwest. Rep., 760.

Notes of Cases on Competency of Infants.

At what age a child's testimony has been received where capacity was shown.

Alabama: McGuff *v.* State, 88 Ala., 147; s. c. 7 Southern Rep., 35 (a child of seven and a half). *Georgia*: Moore *v.* State, 1888, 5 Southeast. Rep., 51 (a boy of ten). *Iowa*: State *v.* Severson, 1889, 43 Southwest. Rep., 533 (boy of twelve). *Missouri*: State *v.* Doyle, 1892, 17 Southwest. Rep., 751 (child of nine). *Nebraska*: Davis *v.* State, 1891, 47 Northwest. Rep., 854 (a nine year old child). *New York*: Agnew *v.* Brooklyn City R. Co., 5 N. Y. Supp., 756 (child under eight); Jones *v.* Brooklyn, etc., R. Co., 3 *id.*, 253 (boy of eleven). *Texas*: Parker *v.* State, Tex. App., 1893, 21 Southwest. Rep., 604 (a boy of twelve); Comer *v.* State, Tex. App., 1893, 20 *id.*, 547 (a child of ten); Hawkins *v.* State, 27 Tex. App., 273 (boy of eleven).

At what age a child's testimony has not been received where incapacity was shown.

Alabama: Kelton *v.* State, 88 Ala., 189; s. c. 7 Southern Rep., 38 (a boy of fourteen). *Georgia*: Johnson *v.* State, 76 Ga., 76 (a six year old girl, though she was called to show a rape upon herself). *West Virginia*: 37 W. Va., 565; s. c. 16 Southwest. Rep., 565 (an infant of such tender years and mind as to be legally irresponsible for her conduct). *Texas*: Halst *v.* State, 1887, 3 Southwest. Rep., 757 (a child of seven).

In Tobey *v.* Leonards, 2 Wallace, 423, a bill in equity for reconveyance and compensation for waste. Mr. Justice Wayne said as to the introduction of children as witnesses: "Where the father of a family introduces the juvenile members of it, as witnesses in such a litigation as *this* has been, it cannot be done without its being considered as a forlorn effort of parental obliquity."

District of Columbia *v.* Armes, 107 U. S., 519.

DISTRICT OF COLUMBIA *v.* ARMES.

Supreme Court of the United States, 1882.

[Reported in 107 U. S., 519.]

An insane person is a competent witness, if it appears to the court, upon examination of him and competent witnesses, that he understands the obligation of an oath, and is capable of giving a correct account of the matters which he has seen or heard in reference to the questions at issue.

Action against a municipal corporation, for damages for injuries received from a fall caused by a defective sidewalk.

The plaintiff's spine was injured, producing partial paralysis which resulted in the impairment of his mind.

On the trial in the *Supreme Court of the District of Columbia*, the plaintiff was offered and received as a witness, against defendant's exception to him as incompetent on account of deranged mind.

The *Supreme Court of the United States* affirmed the judgment.

FIELD, J. [*After stating the facts*]: The present action was for the injury thus sustained. He was himself a witness, and it appeared from his testimony that his mind was feeble. His statement was not always as direct and clear as would be expected from a man in the full vigor of his mind. Still it was not incoherent, nor unintelligible, but evinced a full knowledge of the matters in relation to which he was testifying. A physician of the Government Hospital for the Insane, to which the deceased was taken two years afterwards, testified that he was affected with acute melancholy; that sometimes it was impossible to get a word from him; that his memory was impaired, but that he was able to make a substantially correct statement of facts which transpired before the injury took place, though, from the impairment of his memory, he might leave out some important part, that there would be some confusion of ideas in his mind, and that he should not be held responsible for any criminal act. A physician of the Freedmen's Hospital, in

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which the deceased was at one time a patient after his injuries, testified to a more deranged condition of his mind, and that he was, when there in June, 1879, insane. He had attempted to commit suicide, and had stuck a fork into his neck several times. Upon this, and other testimony of similar import, and the feebleness exhibited by the deceased on the stand, the counsel for the city requested the court to withdraw his testimony from the jury, on the ground that his mental faculties were so far impaired as to render him incompetent to testify as a witness. This the court refused to do, but instructed the jury that his testimony must be taken with some allowance, considering his condition of mind and his incapacity to remember all the circumstances which might throw some light on his present condition. This refusal and ruling of the court constitute the first error assigned.

The ruling of the court and its instruction to the jury were entirely correct. It is undoubtedly true that a lunatic or an insane person may, from the condition of his mind, not be a competent witness. His incompetency on that ground, like incompetency for any other cause, must be passed upon by the court, and to aid its judgment, evidence of his condition is admissible. But lunacy or insanity assumes so many forms, and is so often partial in its extent, being frequently confined to particular subjects, while there is full intelligence on others, that the power of the court is to be exercised with the greatest caution. The books are full of cases where persons showing mental derangement on some subjects evince a high degree of intelligence and wisdom on others. The existence of partial insanity does not unfit individuals so affected for the transaction of business on all subjects, nor from giving a perfectly accurate and lucid statement of what they have seen or heard. In a case in the Prerogative Court of Canterbury, counsel stated that partial insanity was unknown to the law of England; but the court replied that if by this was meant that the law never deems a person both sane and insane at one and the same time upon one and the same subject, the assertion was a truism; and added: "If, by that position, it be meant and intended that the law of England never deems a party both sane and insane at different times

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upon the same subjects; and both sane and insane at the same time upon different subjects; (the most usual sense, this last, of the phrase 'partial insanity'), there can scarcely be a position more destitute of legal foundation; or rather there can scarcely be one more adverse to the stream and current of legal authority." *Dew v. Clark*, 3 Add. E. R., 79, 94.

The general rule, therefore, is, that a lunatic or a person affected with insanity is admissible as a witness if he have sufficient understanding to apprehend the obligation of an oath, and to be capable of giving a correct account of the matters which he has seen or heard in reference to the questions at issue; and whether he have that understanding is a question to be determined by the court, upon examination of the party himself, and any competent witnesses who can speak to the nature and extent of his insanity. Such was the decision of the Court of Criminal Appeal in England, in the case of *Reg. v. Hill*, 5 Cox Crim. Cas., 259. There the prisoner had been convicted of manslaughter; and on the trial a witness had been admitted whose incompetency was urged on the ground of alleged insanity. He was a patient in a lunatic asylum, under the delusion that he had a number of spirits about him which were continually talking to him, but the medical superintendent testified that he was capable of giving an account of any transaction that happened before his eyes; that he had always found him so; and that it was solely with reference to the delusion about spirits that he considered him a lunatic. The witness himself was called, and he testified, as follows: "I am fully aware I have a spirit, and twenty thousand of them. They are not all mine. I must inquire. I can where I am. I know which are mine. Those that ascend from my stomach and my head, and also those in my ears. I don't know how many they are. The flesh creates spirits by the palpitation of the nerves and the rheumatics. All are now in my body and around my head. They speak to me incessantly, particularly at night. That spirits are immortal, I am taught by my religion from my childhood. No matter how faith goes, all live after my death, those that belong to me and those that do not." After much more of this kind of talk he added: "They speak to me instantly; they are speaking

to me now ; they are not separate from me ; they are around me speaking to me now, but I can't be a spirit, for I am flesh and blood. They can go in and out through walls and places which I cannot." He also stated his opinion of what it was to take an oath : " When I swear," he said, " I appeal to the Almighty. It is perjury, the breaking of a lawful oath, or taking an unlawful one ; he that does it will go to hell for eternity." He was then sworn, and gave a perfectly collected and rational account of a transaction which he declared that he had witnessed. He was in some doubt as to the day of the week on which it took place, and on cross-examination said : " These creatures insist upon it, it was Tuesday night, and I think it was Monday ;" whereupon he was asked : " Is what you have told us what the spirits told you, or what you recollected without the spirits ?" And he said : " No ; the spirits assist me in speaking of the date ; I thought it was Monday and they told me it was Christmas eve, Tuesday ; but I was an eye-witness, an ocular witness to the fall to the ground." The question was reserved for the opinion of the court whether this witness was competent, and after a very elaborate discussion of the subject it was held that he was. Chief Justice Campbell said that he entertained no doubt that the rule laid down by Baron Parke, in an unreported case which had been referred to, was correct, that wherever a delusion of an insane character exists in any person who is called as a witness, it is for the judge to determine whether the person so called has a sufficient sense of religion in his mind and sufficient understanding of the nature of an oath, for the jury to decide what amount of credit they will give to his testimony.

" Various authorities," said the Chief Justice, " have been referred to, which lay down the law that a person *non compos mentis* is not an admissible witness. But in what sense is the expression *non compos mentis* employed ? If a person be so to such an extent as not to understand the nature of an oath, he is not admissible. But a person subject to a considerable amount of insane delusion may yet be under the sanction of an oath and capable of giving very material evidence upon the subject matter under consideration." And the Chief Justice added : " The proper test must always be, does the lunatic understand what he

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is saying, and does he understand the obligation of an oath? The lunatic may be examined himself, that his state of mind may be discovered, and witnesses may be adduced to show in what state of sanity or insanity he actually is; still, if he can stand the test proposed, the jury must determine all the rest." He also observed that in a lunatic asylum the patients are often the only witnesses of outrage upon themselves and others, and there would be impunity for offenses committed in such places if the only persons who can give information are not to be heard. Baron Alderson, Justice Coleridge, Baron Platt and Justice Talfourd agreed with the Chief Justice, the latter observing that "if the proposition that a person suffering under an insane delusion cannot be a witness were maintained to the fullest extent, every man subject to the most innocent, unreal fancy would be excluded. Martin Luther believed that he had a personal conflict with the devil; Dr. Johnson was persuaded that he had heard his mother speak to him after death. In every case the judge must determine according to the circumstances and extent of the delusion. Unless judgment and discrimination be applied to each particular case, there may be the most disastrous consequences." This case is also found in the 2d of Denison and Pearce's Crown Cases, 254, where Lord Campbell is reported to have said that the rule contended for would have excluded the testimony of Socrates, for he had one spirit always prompting him. The doctrine of this decision has not been overruled that we are aware of, and it entirely disposes of the question raised here.

[*A ruling on another point is here omitted.*]

Judgment affirmed.

NOTE.—The principle in determining the competency of the insane as witnesses seems to be the same both as to an insane person testifying to facts which occurred before mental impairment, and as to a person apparently recovered testifying to facts which occurred during insanity, the latter situation being considered in *People ex rel. Norton v. N. Y. Hospital*, 3 Abb., N. C., 229, where the question of insanity is fully discussed in its applications to witnesses; a distinction being pointed out between allowing testimony as to self regarding facts and those facts that are objectively demonstrable.

After testimony of such a witness has been received, evidence that he

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has been of imbecile mind and memory is admissable to affect his credibility. *Spence v. Brown*, 17 Weekly Dig., 518.

Walker v. State, Ala., 1893, 12 Southern Rep., 33 (if a witness has sufficient capacity to understand an oath, and to narrate the transaction in what appears to be an intelligent and rational manner, he should be allowed to testify, leaving the question of his credibility to the jury). *Worthington v. Meucer* (Ala., 1892), 11 Southern Rep., 72 (one suing as of unsound mind may, nevertheless, testify, if competent).

Lopez v. State (Tex., 1892), 17 Southwest. Rep., 1058 (insane woman cannot testify even as to rape upon herself).

The judge may properly refuse to allow an oath to be administered to a person called as a witness who appears in the judge's opinion, found on inspection, to be *intoxicated*: It is not essential that the record describe the degree of intoxication. *Hartford v. Palmer*, 16 Johns., 143.

Rivara v. Ghio, 3 E. D. Smith, 264.

RIVARA v. GHIO.

At New York Common Pleas, 1854.

[Reported in 3 E. D. Smith, 264.]

After a witness has been examined, even without objection, the adverse party has a right to give evidence by another witness that the former is of impaired mental capacity, such as to affect credibility.

Plaintiff sued for injuries to personal property. After plaintiff's principal witness, Teresa, had testified to the contents of the trunk, without objection, the defendant at a later stage of the trial offered the testimony mentioned in the opinion of the court.

The City District Court excluded the offer, and from judgment for plaintiff defendant appealed.

WOODRUFF, J., [(DANIEL P. INGRAHAM, First Judge, and CHAS. P. DALY, LEWIS B. WOODRUFF and JOHN R. BRADY, JJ.) *after indicating opinion for plaintiff on the merits*]: But we think that the court below erred in rejecting the evidence of John Ginnochio, who was called to prove that the plaintiff's principal witness had been of imbecile mind and memory. Such evidence would tend to prove that less reliance should be placed upon her statements than those of a witness who was *compos mentis*. That a person who is *non compos*, either through derangement or through want of ordinary understanding, is incompetent, is well settled. (10 J. R., 362; 26 Wend., 255; 1 Green. Ev., 464; 17 Mass., 540; 10 Serg. and R., 282, 285.) And when this objection is not taken upon the calling of a witness and, therefore, may perhaps be deemed waived as an objection to the competency of the witness, it may be given in evidence as going to the degree of credit to which the testimony of the witness is entitled, after the plaintiff has rested. It is true that the defendant's counsel states his object to be to prove that the witness had been of imbecile mind and memory. If this were to be taken as a mere offer to prove that at some former period the witness had been thus afflicted, and without

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any inference that that state of things continued to the time of the transaction in question, or to the time of the trial it was immaterial and irrelevant. But proof of imbecility of mind would raise a presumption that such condition continued and might justly detract from, if it did not altogether destroy, the weight to be given to the evidence of the witness. The evidence of a lunatic, given in a lucid interval, might be received, and on proof of lunacy it would lie with the party offering the witness to prove that the lunacy had ceased or intermitted, and this would be a matter still going to the credit of the witness.

Indeed, the reason of the rejection given below appears to have proceeded from the idea that evidence of this description necessarily went to competency only. In this we think the court erred, and the judgment must on this ground be reversed.

Judgment reversed.

State v. De Wolf, 8 Conn., 92.

STATE v. DE WOLF.

Connecticut Supreme Court of Errors, 1830.

[Reported in 8 Conn., 92.]

A deaf mute, capable of relating facts correctly by signs, may testify in that way, through the medium of an interpreter, though also capable of reading and writing, and of communicating ideas imperfectly by writing. A second witness testified that the deaf mute had once communicated to her in writing the substance of what the deaf mute had just testified to, but the present witness did not know where the writing was. *Held*, that the proof of loss was not sufficient to dispense with the production of the writing and, therefore, the testimony of this second witness to its contents was not competent.

Indictment for an attempt to commit a rape.

On the trial, Celestia Bull, a person deaf and dumb from her infancy, was sworn as a witness and testified to the principal facts in the case, by signs, which were interpreted to the court and jury by William W. Turner, a teacher in the American Asylum for the education of the deaf and dumb, who was duly sworn for that purpose, and was also sworn as a witness. Mr. Turner testified that Celestia had resided in the asylum about five years, and was well acquainted with the language of signs, and capable of relating facts correctly in that manner; that she could also read and write, and communicate her ideas imperfectly by writing.

The defendant's objection to her testifying in this manner claiming that she ought to give testimony in her own words in writing, was overruled. Before the defendant had attempted, otherwise than by cross-examination, to discredit Celestia's testimony, the state offered Polly Rowley as a witness to prove that Celestia had previously communicated to her the same story that she had testified to in court. This evidence was admitted against defendant's objection.

It appearing that such communication was in writing, the defendant again objected on the ground that the writing itself should be produced or proved to be lost, but was overruled.

The defendant, having been found guilty, moved for a new

trial on the ground of the judge's decisions as to admission of evidence stated above.

The Supreme Court of Errors granted a new trial.

DAGGETT, J. Several objections were made at the trial against testimony offered by the public prosecutor, which appear on the motion, and are now urged as reasons for granting a new trial. They will be considered in the order presented by the counsel for the prisoner.

1. The supposed victim of the outrage of the prisoner was deaf and dumb. She was sworn, and testified by a sworn interpreter, an instructor in the Asylum for the Deaf and Dumb, through certain signs adopted as a medium of communication by that class of persons. It was objected, by the prisoner, that as it appeared by the testimony of the interpreter, that "she could read and write and communicate her ideas imperfectly by writing;" and it further appeared that "she understood the language of signs, and was capable of relating facts correctly in that manner," she ought to testify in her own words in writing. The judge very properly overruled the objection. The bare statement of the objection overthrows it. She was capable of relating facts correctly, by signs; she could read and write and communicate her ideas imperfectly, by writing. The objection thus viewed presents this absurdity, that the court erred in resorting to the most perfect mode of ascertaining the truth. The mode of examination adopted by the court was the next best mode to an oral examination, which for many obvious reasons, is preferable to an examination in writing, but which could not be had in this case on account of an infirmity in the witness. I see no ground for this objection. [*Here followed a consideration of the admission of Polly Rowley's testimony, confirming the testimony of Celestia before she had been impeached, it being held to have been properly admitted in this case.*]

The witness, Polly Rowley, then testified that in the fall of 1829, Celestia communicated to her in writing the substance of what she had now testified, and that she did not then know where the writing was. Upon this disclosure of the writing the prisoner made a further objection that the writing should be

State v. De Wolf, 8 Conn., 92.

produced, and that she could not testify as to its contents. This objection was overruled and the testimony was admitted. I am of opinion that upon this statement of the facts in relation to the writing the judge should have rejected her testimony. If the paper containing that communication had been lost the fact could have been proved, and then its production would have been dispensed with; but her declaration was simply that she did not know where it was. There was no proof that she had made search for it among her papers. Upon this evidence it can hardly be said that there was any proof of loss so as to let in secondary evidence.

[After consideration of other rulings below not affecting the decision]:

New trial granted.

In *State v. Weldon*, S. C., 1893, 17 Southeast. Rep., 688, it was held that a deaf mute may be examined through sworn interpreters who, though not experts, testify that they had employed the witness and that they had no difficulty in communicating with him by signs.

Logan v. United States, 144 U. S., 263.

LOGAN v. UNITED STATES.

United States Supreme Court, 1892.

[Reported in 144 U. S., 263.]

U. S. R. S., § 858, which provides (after removing incompetency from color, and, in civil actions, from being a party or interested, etc., etc.), that in other respects "the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty"—does not apply to criminal trials.

At common law, and upon general principles of jurisprudence, a conviction and sentence in one state cannot disqualify the convict to testify as a witness in another state, in the absence of express statute in such latter state.*

Under a statute disqualifying a convict "unless he has been legally pardoned for the crime of which he was convicted" †—a full pardon restores competency, although granted after term of imprisonment served.

Such a pardon restores competency to testify as to facts which came to his knowledge even before the pardon.

Upon the trial in the United States Circuit Court in Texas, of several indictments under Sections 5508 and 5509 of the United States Revised Statutes for conspiracy and for murder committed in prosecution of the conspiracy, one *Martin* who had previously been convicted in a court of *North Carolina* of a felony, and one *Spear*, who had been convicted likewise, in a court of *Texas*, were offered as witnesses. It was shown that *Spear* had been pardoned after he had served the term of his imprisonment.

* For the New York Statute, see Code Civ. Pro., §892.

† See *Boyd v. United States*, 142 U. S., 450 (pardon restores a witness' competency, though made with that intent); *S. P. Martin v. State*, 21 Tex. App., 1; but to restore a witness' competency the pardon must be unconditional. *Dudley v. State*, Tex., 1887, 5 Southwest. Rep., 649; *McGee v. State*, Tex., 1892, 16 *id.*, 422. A state statute giving the service of sentence the effect of a pardon may be enough. *U. S. v. Hall*, 53 Fed. Rep., 352.

U. S. R. S. (2d ed.) 1045, § 5392, provides that one who swears falsely under an oath administered under federal law "is guilty of *perjury*, and shall be punished * * * and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed."

Under a similar statute formerly in force in N. Y. (2 R. S., 681, §1), it was held that a person convicted of perjury remains incompetent, notwithstanding subsequent pardon. *N. Y. Supreme Court*, 1851, *Houghtaling v. Kelderhouse*, 1 Park. Cr., 241; *N. Y. Chan.*, 1816, *Holdridge v. Gillespie*, 2 Johns., Ch. 30.

A statute disqualifying one who has been "sentenced" does not disqualify one who has been convicted but not sentenced. See *People v. McGloin*, 91 N. Y., 41.

The United States Circuit Court holding the present trial being held in *Texas*, the defendant's counsel relied, in support of his objection to this testimony, upon the fact that the Statute of *Texas* expressly disqualified all persons convicted of felony "in this state or *any other jurisdiction*, unless * * * the convict has been legally pardoned for the crime of which he was convicted."

Under this statute counsel claimed that *Martin*, convicted in North Carolina, was expressly excluded, and that *Spear*, not having been pardoned till after full punishment, and being called to testify as to facts occurring before pardon, could not be deemed restored to competency.

The U. S. Circuit Court overruled all these objections and admitted the testimony of both witnesses as to material facts, instructing the jury that the conviction and sentence went only to their credibility. The jury found the defendant Logan and two of the others guilty of the conspiracy charged, and not guilty of murder.

The U. S. Supreme Court held the ruling of the Circuit Court as to the competency of the witnesses, Spear and Martin, not error; but reversed the judgment and directed the Circuit Court to order a new trial, on other grounds.

GRAY, J. [*On the question of competency of Spear and Martin*]: In support of the objection to the competency of the two witnesses who had been previously convicted and sentenced for felony, the one in North Carolina and the other in Texas, the plaintiffs in error relied on article 730 of the Texas Code of Criminal Procedure of 1879, which makes incompetent to testify in criminal cases "all persons who have been or may be convicted of felony in this state or in any other jurisdiction, unless such conviction has been legally set aside, or unless the convict has been legally pardoned for the crime of which he was convicted."

By an act of the congress of the Republic of Texas of December 20, 1836, §41, "the common law of England, as now practiced and understood, shall, in its application to juries and to evidence, be followed and practiced by the courts of this Republic, so far as the same may not be inconsistent with this

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act, or any other law passed by this congress." I. Laws of Republic of Texas (ed. 1838), 156. That act was in force at the time of the admission of Texas into the union in 1845. The first act of the state of Texas on the incompetency of witnesses, by reason of conviction of crime, appears to have been the statute of February 15, 1858, c. 151, by which all persons convicted of felony, in Texas or elsewhere, were made incompetent to testify in criminal actions, notwithstanding a pardon, unless their competency to testify had been specifically restored. General Laws of 7th Legislature of Texas, 242; Oldham & White's Digest, 640. That provision was afterwards put in the shape in which it stands in the Code of 1879, above cited.

The question whether the existing statute of the state of Texas upon this subject is applicable to criminal trials in the courts of the United States, held within the state, depends upon the construction and the effect of section 858 of the Revised Statutes of the United States, which is as follows: "In the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried: provided, that in actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with, or statement by, the testator, intestate or ward, unless called to testify thereto by the opposite party or required to testify thereto by the court. In all other respects, the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law and in equity and admiralty."

In the provision, at the beginning of this section, that "in the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried," the distinction between "any civil action" in the second clause, and "any action" in the first clause, shows that the first clause was intended to include criminal actions, or, as they are more commonly called, criminal cases; while the second clause was in terms restricted to civil actions only. *Green v. United States*, 9 Wall., 655, 658.

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And were the whole section to be considered by itself, without reference to previous statutes and decisions, "trials at common law," in the final clause of the section, might also be held to include trials in criminal, as well as in civil cases.

But the history of congressional legislation and judicial exposition on this subject renders such a construction impossible.

By the Judiciary Act of September 24, 1789, c. 20, § 34, it was enacted "that the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." I. Stat. 92. Although that section stood between two sections clearly applicable to criminal cases, it was adjudged by this court at December term, 1851, upon a certificate of division of opinion in the Circuit Court, directly presenting the question that the section did not include criminal trials, or leave to the states the power to prescribe and change from time to time the rules of evidence in trials in the courts of the United States for offences against the United States. Chief Justice Taney, delivering the unanimous judgment of the court, said: "The language of this section cannot upon any fair construction be extended beyond civil cases at common law, as contradistinguished from suits in equity. So far as concerns rights of property, it is the only rule that could be adopted by the courts of the United States, and the only one that congress had the power to establish. And the section above quoted was merely intended to confer on the courts of the United States the jurisdiction necessary to enable them to administer the laws of the states. But it could not be supposed, without very plain words to show it, that congress intended to give to the states the power of prescribing the rules of evidence in trials for offences against the United States. For this construction would in effect place the criminal jurisprudence of one sovereignty under the control of another. It is evident that such could not be the design of this act of congress." "The law by which, in the the opinion of this court, the admissibility of testimony in criminal cases must be determined, is the law of the state, as it was when the courts of the United States were established by

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the Judiciary Act of 1789." "The courts of the United States have uniformly acted upon this construction of these acts of congress, and it has thus been sanctioned by a practice of sixty years." *United States v. Reid*, 12 How., 361, 363, 366.

In 1862, congress enacted that "the laws of the state in which the court shall be held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, in equity, and in admiralty." 12 Stat., 588. By a familiar rule, the words "trials at common law" in this statute are to receive the construction which had been judicially given to the same words in the earlier statute relating to the same subject. *The Abbotsford*, 98 U. S., 440; *United States v. Mooney*, 116 U. S., 104; *In re Louisville Underwriters*, 134 U. S., 488. They have received that construction in several of the Circuit Courts. *United States v. Hawthorne*, 1 Dillon, 422; *United States v. Brown*, 1 Sawyer, 531, 538; *United States v. Black*, 1 Fox, 570, 571. The question has not come before this court, probably because there never was a division of opinion upon it in a Circuit Court, which was the only way, until very recently, in which it could have been brought up.

The provision, "that in the courts of the United States there shall be no exclusion of any witness on account of color, nor in civil actions because he is a party to or interested in the issue tried," was first introduced in 1864 in the Sundry Civil Appropriation Act for the year ending June 30, 1865, as a proviso to a section making an appropriation for bringing counterfeiters to trial and punishment. Act of July 2, 1864, c. 210, § 3; 13 Stat., 351. That proviso, as already suggested, included criminal cases in the first clause, as distinguished from the second. But it had no tendency to bring criminal cases within the general provision of the act of 1862.

The proviso as to actions by or against executors, administrators or guardians, was added, by way of amendment to section 3 of the appropriation act above mentioned, by the act of March 3, 1865, c. 113. 13 Stat., 533. This proviso had evidently no relation to criminal cases.

The combination and transposition of the provisions of 1862, 1864, and 1865, in a single section of the Revised Statutes, put-

ting the two provisos of the later statutes first, and the general rule of the earlier statute last, but hardly changing the words of either, except so far as necessary to connect them together, cannot be held to have altered the scope and purpose of these enactments, or of any of them. It is not to be inferred that congress, in revising and consolidating the statutes, intended to change their effect, unless an intention to do so is clearly expressed. *Potter v. National Bank*, 102 U. S., 163; *McDonald v. Hovey*, 110 U. S., 619; *United States v. Ryder*, 110 U. S., 729, 740.

It may be added that congress has enacted that any person convicted of perjury, or subornation of perjury, under the laws of the United States, shall be incapable of giving testimony in any court of the United States until the judgment is reversed; Rev. Stat., §§ 5392, 5393; and has made specific provisions as to the competency of witnesses in criminal cases, by permitting a defendant in any criminal case to testify on the trial, at his own request; and by making the lawful husband or wife of the accused a competent witness in any prosecution for bigamy, polygamy, or unlawful cohabitation. Act of March 16, 1878, c. 37; 20 Stat., 30; Act of March 3, 1887, c. 397; 24 Stat., 635.

For the reasons above stated, the provision of section 858 of the Revised Statutes, that "the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty," has no application to criminal trials; and, therefore, the competency of witnesses in criminal trials in the courts of the United States held within the state of Texas is not governed by a statute of the state which was first enacted in 1858, but, except so far as congress has made specific provisions upon the subject, is governed by the common law, which, as has been seen, was the law of Texas before the passage of that statute and at the time of the admission of Texas into the union as a state.

At common law, and on general principles of jurisprudence, when not controlled by express statute giving effect within the state which enacts it to a conviction and sentence in another state, such conviction and sentence can have no effect, by way

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of penalty, or of personal disability or disqualification, beyond the limits of the state in which the judgment is rendered. *Wisconsin v. Pelican Ins. Co.*, 127 U. S., 265; *Commonwealth v. Green*, 17 Mass., 515; *Sims v. Sims*, 75 N. Y., 466; *National Trust Co. v. Gleason*, 77 N. Y., 400; *Story on Conflict of Laws*, § 92; 1 *Greenl. Ev.*, § 376. It follows that the conviction of Martin in North Carolina did not make him incompetent to testify on the trial of this case.

The competency of Spear to testify is equally clear. He was convicted and sentenced in Texas; and the full pardon of the governor of the state, although granted after he had served out his term of imprisonment, thenceforth took away all disqualifications as a witness, and restored his competency to testify to any facts within his knowledge, even if they came to his knowledge before his disqualification had been removed by the pardon. *Boyd v. United States*, 142 U. S., 450; *United States v. Jones* (before Mr. Justice Thompson), 2 *Wheeler Crim. Cas.* 451, 461; *Hunnicut v. State*, 18 *Tex. App.*, 498; s. c. 51 *Am. R.* 330; *Thornton v. State*, 20 *Tex. App.*, 519.

Whether the conviction of either witness was admissible to affect his credibility is not before us, because the ruling on that question was in favor of the plaintiffs in error.

NOTE ON THE REMOVAL OF THE DISQUALIFICATIONS OF FELONS.

At common law neither mere verdict of guilty, nor plea of guilty, unless followed by sentence, disqualifies one from testifying as a witness. *People v. McGloin*, 12 Abb. N. C., 172 ; s. c. 91 N. Y., 241. The rule was the same under the New York and Massachusetts statutes. *Id.* *Fay v. Harlan*, 128 Mass., 244.

Modern statutes have removed this disqualification (for New York statute see N. Y. Code Crim. Pro., §413).

And such a statute applies even though the felony was perjury, and perjury committed in the same matter. *People v. O'Neil*, 109 N. Y., 251, 266.

Under such statutes the previous conviction for crime of one called as a witness, may, for the purpose of affecting the credit due to his testimony, be shown, either by the record or by his cross-examination, upon which he must answer any question relevant to that inquiry; and the party cross-examining him is not concluded by his answer to such a question. *People v. McGloin* (*above cited*). So held under N. Y. Code Civ. Pro., §2832. *Comm. v. Ford*, 15 Northeast. Rep., 153.

Where a felon is incompetent, oral evidence of his conviction, etc., drawn out on his cross-examination without objection, is sufficient to entitle the objecting party to have his testimony struck out. *People v. Perry*, 86 N. Y., 353.

The record of a former conviction received in evidence cannot be contradicted by testimony that the convict was innocent. *Comm. v. Gallagher*, 126 Mass., 54. S. P., *Myers v. State*, 92 Ind., 390 (holding that it cannot be attacked collaterally).

For recent cases on the removal of the DISQUALIFICATION BY STATUTE, see the following:

Florida: *Williams v. Dickenson*, 28 Fla., 90; s. c. 9 Southern Rep., 847 (conviction for statutory offense of house burning does not disqualify).

Georgia: *Brunswick, etc., R. Co. v. Clew*, 1888, 7 Southeast. Rep., 84 (Ga. Code §3854).

 Note on the Removal of the Disqualifications of Felons.

Kentucky: Commonwealth v. Minor, 1890, 13 Southwest. Rep., 5 (Ky. Gen. Stat. C. 29, Art. 8); Commonwealth v. McQuire, 84 Ky., 57.

Louisiana: State v. McManus, 42 La. Ann., 494 (La. Act, 1886, No. 29); State v. Mock, 41 *id.*, 1079.

New York: People v. O'Neil, 48 Hun, 36; Affd. in 16 Northeast. Rep., 68 (under N. Y. Penal Code, §714, even conviction for perjury does not disqualify).

Tennessee: Rayland v. State, 1888, 7 Southwest. Rep., 456 (Tenn. Acts, 1887, C. 79, §1).

United States: United States v. Hollis, 43 Fed. Rep., 248 (under 20 U. S. Stat. at large, 30, permitting accused to testify in his own behalf does not render him competent if previously convicted of an infamous crime); but compare Ransom v. State (Ark. 1887), 4 Southwest. Rep., 658.

CONVICTION.—*Missouri*: State v. Rose, 1887, 4 Southwest. Rep., 733 (unless the witness is identified as the person named in the record of conviction, he may testify).

Texas: Petner v. State, 1887, 5 *id.*, 210 (conviction in another state disqualifies under Tex. Code Crim. Pro., §730). Jones v. State, Tex. App., 1893, 22 Southwest. Rep., 404, (before sentence is actually pronounced or pending an appeal from a sentence of conviction, the accused is not a convict as defined by Tex. Pen. Code, Art. 27, and is not therefore disqualified as a witness); *contra*, Woods v. State, 26 Tex. App., 490; s. c. 10 Southwest. Rep., 108.

United States: United States v. Hall, D. C., 1893, 53 Fed. Rep., 352 (upon a criminal trial in a federal court in Pennsylvania, a person convicted of murder by a court of that state is disqualified as a witness).

Virginia: Brown v. Commonwealth, 86 Va., 935; s. c. 11 Southeast. Rep., 759 (one found guilty of a felony, but not sentenced, is not disqualified as a witness).

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PEOPLE OF THE STATE OF NEW YORK v. DOHRING.

New York Court of Appeals, 1874.

[Reported in 59 N. Y., 374.]

It seems that a juror may be a witness on the trial before himself and his fellows, first being sworn as a witness, besides having been sworn as a juror.

It seems that where the judge is actually trying the cause and his presence is necessary to constitute the court, he cannot against objection testify as a witness in such cause.

A justice of the peace, while sitting as an associate judge in the Court of Session on the trial of a prisoner, was examined as a witness, and gave material evidence in the case without objection. *Held*, that though [reviewing authorities] this was error for which conviction might have been reversed had exception been taken, yet the court did not thereby lose jurisdiction; for all the component parts of the court remained present taking part in the trial.

The defendant, Charles Dohring, was indicted at the Court of Sessions for rape committed upon one Frederica Brussow, a girl of about fourteen years of age, while she was living with him as a servant.

The power to hold Court of Sessions is given by the constitution of the state of New York (article VI, § 15) in these words:

"The county judge, with two justices of the peace, to be designated according to law, may hold Courts of Session, with such criminal jurisdiction as the legislature shall prescribe, and he shall perform such other duties as may be required by law."

At the trial, Alden S. Baker, one of the judges, was called from the bench to the stand as a witness on the part of the prisoner, and also recalled by the prosecution, and he gave substantial testimony during the progress of the trial, without objection.

In the Court of Sessions defendant was convicted.

The Supreme Court at General Term reversed the judgment, being of the opinion that while Justice Baker was upon the witness stand, there was no lawfully constituted court. It was disorganized by calling him from the bench and subjecting him to examination as a witness, and there was no court to pass upon the

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questions relating to the admissibility of evidence or any other question.

The Court of Appeals, while overruling this point, affirmed the judgment on other grounds.

FOLGER, J. [*on this point, said*]: It has been held that the two justices of the sessions are indispensable to constitute a legally organized Court of Sessions, and that neither can be dispensed with any more than the county judge. (*Blend v. The People*, 41 N. Y., 604). The question there arose, however, upon objection and exception taken by the plaintiff in error, and was passed upon as an error, and not as a matter affecting the jurisdiction of the court. The court was held disorganized, by one of the justices of sessions who had taken part in the proceedings on the trial for a time, after that, absenting himself from the place where the court was held, and not reappearing. It is said there, that it was not the case of a member of the court leaving the bench for a few moments, intending to return, but a total abandonment of the trial, in consequence of which one-third of the court was changed. It there appears that another justice of the peace was called by the circuit judge to the vacant place.

In the case in hand, the justice of the sessions who was sworn as a witness did not leave the court room while the trial was progressing; he did not abandon the trial; he left the bench for a space, intending to soon return to it, and did soon return. The mere absence from the bench, while he was in the witness box, did not bring this case within that above cited. If the Niagara County Sessions lost jurisdiction of this case, it was not because any of the members of the court were not present at the trial, ready to perform the duty assigned to them by the laws. The court had, in the first instance, obtained jurisdiction and was in the exercise of it. Did it lose it because one of its members was called from his place on the bench to stand for a time in the witness box and give testimony? We are inclined to think that it was error to permit him to take his place and be sworn and testify, as a witness. It was erroneous, not because in this instance any harm came either to the people or to the defendant, for neither made objection, and both consented; but because such

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practice, if sanctioned, may lead to unseemly and embarrassing results, to the hindering of justice, and to the scandal of the courts. Thus, it has been sanctioned that two of the members of a court constituted by especial commission, might be sworn and testify as witnesses against one on trial before it. But in that case it would seem that without them there was a court of legal fullness and capacity to conduct the business; for they did not, after being improved as witnesses, return to their seats on the bench. (*Rex v. Hacker*, Kel., fol. 12, cited in Hawk, P. C., Chap. 46, § 17.) It is asserted that in *Reg. v. Lee*, and *Reg. v. Blunt* (1 St. Tr., 1403, 1415), in the year 1600, Popham, Ch. J., was both judge and witness; but one would not wish to build on the precedents alone of those trials in those times. When a nobleman is tried by the house of lords, any of the peers is a competent witness. (Lord Stafford's Case, 7 How. St. Trials, 1384, 1458, 1552; Earl of Macclesfield's Case, 16 *id.*, 1252, 1391). In those cases, certain lords were not only witnesses, but afterward gave their votes upon the question, guilty or not guilty. But the same reason was there, that without them, peers enough were present to form a court; an additional reason is given also, that they acted in the capacity of jurors as well as of judges; and it is settled, that a juror may be a witness on a trial before himself and his fellows, first being sworn as a witness, besides his oath as a juror. (*Rex v. Rosser*, 7 C. & P., 648; *Manley v. Shaw*, Car. & M., 361; *Anon.*, 1; *Salk.*, 405; *Bennett v. Hundred of Hartford*, Styles, 233; *Fitz James v. Moyes*, Siderfin, 133.) But where the judge, who is called to the witness box, is actually trying the cause, and his continuance in action as judge is necessary to the seemly and proper trial of the cause, then he may not become a witness; it is error so to do, and if objection be made, and exception taken, it is fatal error. In *North v. Champernoon*. (Cases in Ch., pt. 2, p. 78), it was held: If a commissioner in a cause be himself examined as a witness, he must be first examined; and if others be before him examined in his presence, he cannot be afterward examined, having heard the former examinations. A commissioner, who had so done, came up afterward and was examined in court; but his deposition was suppressed on motion.

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In *Ross v. Buhler* (2 Martin [N. S.,] [La., 312), it was held, that one cannot be examined as a witness at a trial where he sits as judge. One of the reasons there given does not apply to the case in hand. It was asked there, who is to administer the oath ? But that was done in the court below, in the case in hand, by the clerk. It is though, as applicable in this case as that, the consideration that the judge is to determine on his own competency, and whether to give a non-suit in a civil case, or to instruct the jury to acquit in a criminal one. (*The People v. Bennett*, 49 N. Y., 137.) Other considerations may be added. If a judge is put upon the stand as a witness, he has all the rights of a witness, and he is subject to all the duties and liabilities of a witness. It may chance, that he may, for reasons sufficient for himself, but not sufficient for another of equal authority in the court, decline to answer a question put to him, or in some other way bring himself in conflict with the court. Who shall decide what course shall be taken with him ? Shall he return to the bench and take part in disposing of the interlocutory question thus arising, and upon the decision being made, go back to the stand, or go into custody for contempt ? The first would be unseemly, if not unlawful, for it would be passing judicially upon his own case. The last would disorganize the court and suspends its proceedings. Other like results may be conceived as possible, equally as contrary to the good conduct of judicial proceedings. (*Reg. v. Gazard*, 8 C. & P., 595 ; see an interesting footnote, 1 Campbell's Lives, Ch. Jus., 166.) Therefore the inclination of the courts has been to hold, that when it is necessary for the conduct of the trial that one should act as judge, he may not be called from the bench to be examined as a witness ; but when his action as a judge is not required, because there is a sufficient court without him, he may become a witness ; though it is then decent that he do not return to the bench. (See, also *People v. Miller*, 2 Park. Cr., 197 ; *Morss v. Morss*, 11 Barb., 510.)

In the case here, the justice of the sessions, who was examined as a witness was a necessary part of the court, without whose continued presence and assisting action it would have been broken up, as we have seen from *Blend v. People* (*supra*). It was erroneous for him to become a witness in the case.

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The error is not available here, because he was examined by the consent of the People and the prisoner.

But the fact is not relied upon as error. A more fundamental position is taken. It is insisted that the court became no court, and the county judge and the other justices of the sessions lost jurisdiction of the case.

We are not of that mind. All the constituents of the Court of Sessions were together in one place. All and each were ready and able to perform each and every duty incumbent upon them. That one of the members of the court was not in the place in the room customary for one to occupy holding his office, did not disorganize and disrupt the court. If so, a temporary absence from the bench for any purpose would work the same result; *Blend v. People (supra)* pronounces against such effect.

We have seen that a juror may be sworn and give his testimony to the court and to his fellows without breaking up the panel, yet he for the moment may be out of the jury box and performing a double duty, rendering his testimony as a witness, and noting its effect in aiding or abating the force of that which had gone before it.

The attitude of a judge standing as a witness is not different in result upon his judicial function. He still retains it and is still in the exercise of it, still has his jurisdiction of the case before him, together with his fellows on the bench. All of the component parts of the court are present together and co-operating, all the requisites of jurisdiction still exist as lively as when the trial began. There was no physical impossibility, as there was in *Blend v. The People (supra)*, in Justice Baker at any moment on the arising of a question asking a decision from the bench, joining with the other members of the court in arriving at and pronouncing it.

Cancemi's Case (18 N. Y., 128), and others (*The People v. Campbell*, 4 Park., 386; *Grant v. The People, id.*, 527), are cited. They are not applicable. In the first, confessedly, there was not present for a part of the trial, nor on the rendition of the verdict, a full and constitutional panel of jurors. One had been withdrawn from the panel and had been dismissed from the case, and but eleven remained doing the duty which by law could

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be done only by twelve. It was held that consent in a criminal case would not give jurisdiction to a tribunal not known to the law. The *People v. Campbell*, is like it. It holds that where a court is without jurisdiction, consent cannot give it in a criminal case. *Grant v. The People*, holds that an issue upon a special plea to an indictment can only be tried by a jury, and consent cannot give jurisdiction to the court to try it without a jury. But here, as we have shown, the tribunal created by the law, had regularly acquired jurisdiction of the case, and remaining in due and orderly session, retained it to the end, without aid from the consent of the parties, or either of them.

Note on Incompetency of Husband and Wife.

NOTE ON THE REMOVAL OF THE INCOMPETENCY OF HUSBAND AND WIFE.

The competency of husband or wife to testify for or against each other is now regulated by statute creating a few exceptions. For the New York Act as to Civil Cases, see Code Civ. Pro., § 831 ; as to Criminal Cases, Penal Code, § 715.

If the parties to the marriage have been divorced, the incompetency, if resulting from the marriage, even in the excepted cases, is at an end.

The dissolution may be proved by the record of the divorce, which *it seems* is the only competent primary evidence of it ; and such judgment cannot be excluded either for error or irregularity in its recovery.

Wottrich *v.* Freeman, 71 N. Y., 601 (husband's action against paramour for crim. con., supported (after divorcing his wife, and proving the divorce by the record), by calling her to testify to the marriage and also to prove the charge in the complaint.

If secondary evidence were not objected to by either the party or the witness, it would be sufficient. See Perry *v.* People, 86 N. Y., 353.

People v. Wood, 126 N. Y., 249.

THE PEOPLE OF THE STATE OF NEW YORK v.
WOOD.*New York Court of Appeals, 1891.*

[Reported in 126 N. Y., 249.]

The statute (N. Y. Penal Code, § 715) removing the common law disqualification of husband and wife to testify for or against each other, but adding that neither "can be compelled to disclose" a confidential communication, etc.,—the privilege is not the personal privilege of the witness; but the other spouse, if a party, may object.

Where the wife was asked to disclose such a communication, while testifying on the trial of an indictment against her husband, *held*, that it was error to overrule the objection of the husband, and put her to a claim of privilege thus extracting a *quasi* admission that the communication might be evidence hurtful to the husband.

Defendant was indicted for murder for killing Leander Pasco by shooting while he was passing by the roadside. Upon the trial, Mattie Wood, the wife of defendant, called as a witness for defendant, was asked by one of the trial judges, by way of cross-examination: "Did Cal on this occasion say to you that he wanted to go up to his father's, and he wanted you to go along with him?"

Defendant's counsel objected to this as incompetent, calling for a confidential communication between husband and wife, and within Code Crim. Pro., § 715.

The Court: "I think the objection lies with the witness who is called, and the witness should be instructed in relation to it."

Defendant's counsel declines to give any instruction to the witness, and stands upon his objection as above set forth.

The court overruled the objection but at the same time said to the witness: "You need not answer the question in regard to the conversation with your husband, unless you choose; you may or may not refuse to answer, as you choose."

Defendant excepted to the admission of the question and also to the ruling that it is not a ground of objection, but is a personal privilege of the witness. Question repeated.

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The Court to witness: You may answer that or not just as you choose.

A. I don't wish to answer.

PECKHAM, J. [*after reviewing other objections*]: We think that other errors were committed upon the trial.

One was in regard to the right of the defendant to object to his wife giving any evidence of confidential communications from the defendant, her husband, to her. The court held that it was not the right of the defendant to take the objection, but that it was the personal privilege of the wife, and she was put to her election whether she would answer or not, and she thereupon declined to answer. To this ruling the defendant objected and duly excepted. I think the decision, while, as a result, keeping out the alleged confidential communications, yet did so by improperly extracting a *quasi* admission from the wife that the communication was of a nature to hurt the defense. If the defendant had the right to object, and to thus relieve the witness from any such partial admission, I think the exception was good, and not merely of a technical nature. Perhaps the judgment would not be reversed for that error, because it would seem that the communications had already substantially been proved. But I believe the ruling was in its nature erroneous. The common-law rule that husband and wife cannot be witnesses for or against each other has been modified by the Penal Code (§ 715). That section makes a husband or wife of a person indicted or accused of crime in all cases a competent witness, but "neither a husband nor wife can be compelled to disclose a confidential communication made by one to the other during their marriage."

We are of the opinion that this section does not leave the matter entirely to the discretion of the witness, but that the other party interested may object to any such communication, and that upon such objection being made the witness not only cannot be compelled, but that he or she has no right to make the disclosure.

All the judges concurred.

Judgment reversed on this and other grounds.

Warner v. Press Publishing Co., 132 N. Y., 181.

WARNER v. PRESS PUBLISHING COMPANY.

New York Court of Appeals, 2d Div., 1892.

[Reported in 132 N. Y., 181.]

A question calling for a conversation between the witness and his wife, the only object of the question being to show that she had expressly or tacitly admitted to him improper relations between herself and a third person, is incompetent for it calls on her to testify as to what must be regarded as a confidential communication.

Action for libel, imputing unchastity.

The facts as to the question of evidence appear in the opinion below.

The plaintiff recovered, and defendant appealed.

PARKER, J. [*after ruling on an exception to the charge*]: Our attention is called to but one other exception.

The libelous article suggests improper relations between the plaintiff and one Smith, evidenced by letters from Smith to her. She denied not only the charge, but all knowledge of the letters. The defendant asserted the truth of the charges and insinuations contained in the article, and in support of its contention called the husband of the plaintiff, to whom the following questions were propounded:

"Q. Had you any dispute with Mrs. Warner at any time about Smith? Q. Had you any conversation with Mrs. Warner your wife, at any time in relation to a man by the name of Frank Smith or F. Sidney Smith?"

Objection was made that the evidence was incompetent under section 831 of the Code of Civil Procedure, which provides that "a husband and wife shall not be compelled or without the consent of the other, if living, allowed to disclose a confidential communication made by one to the other during marriage."

The evidence offered could have no purpose useful to the defendant unless it tended to show that during such a conversation with her husband she said or did, or omitted to say or do some-

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thing, from which it might be inferred that there existed an unlawful intimacy between her and Smith.

A conversation on such a subject between husband and wife seems to us to be clearly within the protection of the statute.

The appellant calls our attention to the decision in *Parkhurst v. Berdell* (110 N. Y., 386-393), in which Judge Earl, in speaking for the court, said: "What are confidential communications within the meaning of the section? Clearly not all communications made between husband and wife when alone. They are such communications as are expressly made confidential, or such as are of a confidential nature, or induced by the marital relations."

Clearly, the definition given does not exclude such a conversation as the defendant desired to prove from the protection of the statute. Its nature was not only confidential, but it was apparently induced by the marital relation, for it cannot be conceived that such a topic would have been the subject of discussion but for the existence of such relation between the parties.

A further test by which to determine whether a communication is confidential is suggested by the learned judge in characterizing the nature of the conversations sought to be excluded in that case. He said: "They were ordinary conversations relating to matters of business which there is no reason to suppose he would have been unwilling to hold in the presence of any person."

It cannot be supposed that both husband and wife would have been willing to discuss such a subject in the presence of other persons or would have consented to a repetition of the conversation by either party to it. Its nature and the relation of the parties, forbade the thought of its being told to others, and the law stamped it with that seal of confidence which the parties in such a situation would feel no occasion to exact.

The wisdom of the statute was never more apparent than in this case which exhibits the worthless husband in the attempted rôle of a destroyer of the good name of the mother of his children because she sought in the name of the law to compel him to contribute towards her support and that of his children.

The judgment should be affirmed.

All of the judges concurred.

People v. Hayes, 140 N. Y., 484.

PEOPLE v. HAYES.

New York Court of Appeals, January, 1894.

[Reported in 140 N. Y., 484.]

The protection of privilege against the competency of a written confidential communication between husband and wife cannot be invoked by either of them who has intentionally disclosed the communication by delivering it to a third person.

A party who has united in a stipulation that all of the evidence of a witness called by him on a former trial shall be read; the one who called the witness to read the direct and the other the cross, but subject to all legal objections, cannot refuse to read his part on the ground that so doing would enable the other to read the corresponding cross-examination which includes privileged matter; for the reservation of all legal objections must be understood to mean legal objections of the party against whom the testimony was given.

If a number of letters are offered in evidence, it is not error to receive them against a general objection to all, if some of them contradict a witness, and might, as evidence, have some weight upon the question of credibility. To render an exception available as against those not material, separate objection should be made to them.

When a husband or a wife, to whom a written communication is made by the other, makes it public by giving it to a third person, the confidential character of the communication is gone, and the one guilty of the breach of confidence cannot thereafter claim the privilege.

The rule against commenting on the omission of the accused in a criminal case to testify in his own behalf, is not violated by giving the jury to understand, in connection with that rule, that the prisoner had a right to say in effect to the prosecution that they must prove their case, and that in his judgment, the situation was such that he was not bound to take the witness stand.

It is within the discretion of the trial judge to give a witness into custody, even in the presence of the jury before the trial is concluded, because of the character of his testimony.

Appeal from a judgment affirming a conviction on an indictment for perjury in the making of a false affidavit used upon a motion to open a default in a civil action.

The defaulted action was founded upon a promissory note for \$2,000, made by defendant and payable to the order of the plaintiff therein, Annie M. Keating.

The defendant, for the purpose of opening that default, swore to an affidavit that he never owed Annie M. Keating a dollar in

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his life; that he never gave her a promissory note; that he had never seen the note, and knew nothing whatever about it.

The default was opened, and an answer was thereupon interposed, setting up substantially the matter contained in the affidavit.

At the trial upon the indictment the counsel for defendant called the wife of the defendant as a witness, but before the examination was concluded she became ill and was obliged to retire.

The district attorney then offered to allow the testimony so far given by Mrs. Hayes to stand as given, without cross-examination, provided, however, among other things, that the evidence given by her upon a former trial of the indictment "shall be used upon this trial with the same force and effect, and subject to the same objections and exceptions as though it were actually given in court with the witness in the chair."

The defendant's counsel said: "That the testimony stand as given here, and that the testimony on the former trial is to be read on this trial, subject to all legal objections, of course, and exceptions; and also, that the examination in chief and redirect shall be read by our side, and the cross-examination and recross-examination shall be read by the learned district attorney."

The Court: "That includes the entire testimony of the witness on the former trial?"

Defendant's Counsel: "Yes, sir."

District Attorney: "Subject to all legal objections and exceptions."

Subsequently, the defendant's counsel, after reading a portion of the deposition, said: "Now, that next question we do not wish to read, your Honor, because it was in reference to a question that, I think, your Honor has ruled upon—referring to a matter of belief."

District Attorney: "I submit that the entire examination should be read, subject to objection and exception."

Defendant's Counsel: "The rule is, that we shall read the whole of the examination, as far as we adopt it, and it is for the court to rule upon our declination to read."

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The Court: "I think you should read the entire examination in chief, leaving you to make such objections as you think are proper."

Exception taken.

One Noah, a witness for the defense, admitted upon cross-examination that he had made a false certificate as a notary public to the effect that Mrs. Hayes had appeared before him and acknowledged the execution of an instrument, importing to have been executed by her; as a matter of fact, Mrs. Hayes had not appeared before him.

At the end of his testimony, the learned judge said: "Now, in view of the testimony of this witness, I have but one duty to perform. I direct the officer to take this witness into custody."

Defendant's Counsel: "I object to your Honor's making that public announcement."

The Court: "Take him into custody."

Defendant's Counsel: "At this time, because of its possible effect upon the jury."

The Court: "Take him."

Defendant's Counsel: "And I earnestly and seriously protest against such extraordinary efforts being made to obtain a conviction. I solemnly declare, from my place at the bar, that I do not believe that such a course, in the trial of a criminal, has been adopted in a long time."

The Court: "I think the remarks of counsel are very improper."

The jury found a verdict against defendant.

The Supreme Court at General Term affirmed judgment against him.

George M. Curtis, for appellant.

Henry B. Stapler (*De Lancey Nicoll*, district attorney) for the respondents.

The Court of Appeals affirmed the judgment.

PECKHAM, J. [*after passing upon other subjects*]: (3) There were certain letters written to the defendant by his wife. These

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letters were offered by the People, and received in evidence under the objection of the defendant, and it is now urged that their admission was error for which a new trial should be granted. The counsel for the defendant upon this trial had called the wife of defendant as a witness, and she had broken down in health before the examination was concluded, and became so ill that it was impossible to take her examination at the house. In order to obtain the benefit of her evidence in the case the defendant had to come to some understanding with the district attorney, or the testimony already given would have to go out, and nothing further could be admitted. Hence the stipulation as to the reading of all the evidence of the witness taken upon the former trial, subject to all legal objections. That meant the legal objections of the party against whom the testimony was given. When the defendant read the direct examination it was subject to the legal objections which the district attorney might make, and when the latter read the cross-examination it was subject to the legal objections thereto made by the counsel for the defendant; but each side was by the very terms of the stipulation to read the whole of the direct or cross-examination, as the case might be. The objection on this occasion was first made by defendant's counsel, who refused to read the particular portion of the direct examination, which, as the district attorney claimed, rendered some portions of the subsequent cross-examination (these particular letters included) admissible in evidence. The court, because of the stipulation, committed no error in compelling the reading of the evidence, and defendant's exception to that ruling is not good.

Subsequently, when the district attorney offered the letters in evidence, the defendant's counsel objected to their introduction upon the ground that they were confidential communications from a wife to her husband and hence were inadmissible. Some expressions in one or two of the letters were undoubtedly contradictory of a portion of the testimony given by the witness upon the first trial. That particular portion of the wife's evidence the defendant had been compelled by the court to read. The People were entitled to the benefit of whatever contradiction there was. If some of the letters contained nothing by way of

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contradiction, and hence might have been claimed to be inadmissible for that reason, it is seen that there was no separate and distinct objection made to a particular letter that it contained no contradictory matter.

The objection of immateriality made by defendant was upon the ground that the letters only contradicted the witness upon an immaterial matter, viz., her belief as to the paternity of the child of the prosecutrix, Miss Keating, whether it was the child of the witness' husband or his brother's. We think the letters which contradicted the witness upon that question were properly received in evidence, and there was no separate objection taken to the others. Those which contradicted the witness might, as evidence, have some weight upon the question of her credibility, and the contradiction cannot be said to have been so plainly upon an immaterial matter as to have rendered the admission of the letters error on that ground.

The further ground of objection to their admission was that they were confidential communications from a wife to her husband. The answer to this objection is that the letters, after they had been received by the defendant, were given by him to his mistress, the prosecutrix, Annie M. Keating, and she subsequently delivered them to this district attorney by whom they were offered in evidence. Comment upon the baseness of this act of the defendant is unnecessary. It speaks for itself. The result, however, is to release the letters from the operation of the rule as to confidential communications between husband and wife and to leave them open to use as evidence to the same extent as if no such rule had ever guarded them.

The rule which protects confidential communications of this nature was founded upon a wise public policy, adopted and pursued for the purpose of encouraging to the utmost that mutual confidence between husband and wife which is the strongest guaranty of a happy marriage. To this end the common law provided that all communications between husband and wife which were of a confidential nature should be kept inviolate and should not be drawn from either party by any process of law. (1 Stark. on Ev. M., p. 39; Greenl. on Ev. [14th ed.] § 254.) The law appreciated the fact that even truth itself might be

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pursued too keenly and might cost too much. The general evil of infusing reserve and dissimulation between parties occupying such relations to each other, would be too great a price to pay for the chance of obtaining and establishing the truth in regard to some matter under legal investigation. (1 Greenl. on Ev., § 240, note a, citing *Minet v. Morgan* L. R. [8 Ch. App.] 361.) The case just cited related to confidential communications between attorney and client, but the principles are also applicable and with added force to communications between husband and wife. If, however, the privilege has been once waived by the parties, it cannot be again invoked. It is personal, so that if one overhear such a communication he may testify to it, if it be otherwise admissible in evidence. (*Comm. v. Griffen*, 110 Mass., 181; *State v. Center*, 35 Vt., 378, 386; *Rex v. Simons*, 6 Car. & P. 540; s. c. 25 Eng. Com. L. 565.) And when the husband or wife, to whom a written confidential communication is addressed, makes it public by giving it to another, the confidential character of the communication has departed and it may be treated like any other communication and put in evidence if otherwise admissible. (*State v. Hoyt*, 47 Conn., 518, 540; *State v. Buffington*, 20 Kans., 599, 613.)

In this case every reason upon which the rule rejecting a confidential communication was originally founded is absent. The letters were addressed by the wife to her husband, and he, deliberately violating every principle of honor and decency, gives the letters to his mistress, by whom they were delivered to the district attorney. A rule which would still preserve the confidential character of these letters as against this husband would be founded upon more sentiment than sense.

(4) The charge of the learned judge in regard to the defendant not going on the stand as a witness was not subject to legal objection. The court told the jury that the defendant was not bound to go on the stand, and that he could say to the prosecution "prove your case against me; it is my judgment that the situation is such that I am not bound to take the witness stand, and the law gives me that right, and the law gives me that privilege. I charge you that the law says there is no presumption to be taken against a defendant by reason of the fact that he does

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not take the witness stand." The charge is criticised on the ground, as alleged, that the language which the judge put in the mouth of the defendant amounted to a covert insinuation that the situation was such that it would be disastrous to the defendant if he took the stand. I think the criticism ill-founded. The jury were plainly instructed as to the law and the rights of the defendant. The insinuation suggested would be unwarranted from the language used. On the contrary, the natural interpretation would be that the defendant regarded the situation as one wholly lacking in proof of guilt, and he was under no obligation to go on the stand and explain what as yet required no explanation. The case of *Ruloffe v. People* (45 N. Y., 213, 222) is authority for the correctness of the course pursued by the learned judge.

(5) The defendant's counsel complains also that one of the witnesses for the defendant was committed to jail by the court in the presence of the jury, because of the character of his evidence given while on the stand as a witness.

This is not a question of legal error. The action of the court was within its power, and to be exercised within the sound discretion of the judge.

That it might have a bad effect upon the jury and thereby prejudice the defendant's case was one of the matters to be considered by the judge before making the order, but we do not think it was legal error to make the order under the circumstances.

We have carefully looked at and considered each and all the other grounds for a new trial which are set forth and discussed in the brief of the counsel for defendant, and we are quite clear that they do not show any errors committed to the prejudice of the defendant.

The judgment should be affirmed.

All the judges concurred, except BARTLETT, J., not sitting.

Judgment affirmed.

NOTES OF RECENT CASES ON CONFIDENTIAL COMMUNICATIONS BETWEEN HUSBAND AND WIFE.

California: Lloyd v. Pennie, 50 Fed. Rep., 4 (letters between a husband and wife, found by the wife's administrator after the death of both are not protected by Cal. Code Civ. Pro., § 1881); People v. Mullings, 83 Cal., 138; s. c. 23 Pacific Rep., 229 (a defendant in a criminal case, who has offered himself as a witness in his own behalf, but who has not testified in chief as to any communication between himself and wife, his wife cannot, without his consent, be examined by the state as to any such communications). *Connecticut*: Spitz's Appeal, 14 Atlantic Rep., 776 (a wife in establishing her claim against her husband's estate before insolvent commissioners may testify as to his representations made to induce her to advance her separate funds as a loan). *Florida*: Henderson v. Chaires, 25 Fla., 26; s. c. 6 Southern Rep., 164 (on trial of a plea in bar of dower, based on adulterous conduct, the widow cannot be examined as to her confessions of unfaithfulness to her husband in his lifetime). *Indiana*: Stanley v. Montgomery, 102 Ind., 102; s. c. 26 Northeast. Rep., 213 (a widow cannot testify as to confidential communications between herself and her deceased husband in his lifetime); Stanley v. Stanley, 1887, 13 Northeast. Rep., 261 (in a wife's action on a bond for her husband's good behavior, she may testify as to his intoxication in her presence); Bietman v. Hopkins, 1887, 9 Northeast. Rep., 720 (a wife may testify as to the negotiations between herself and husband resulting in a conveyance of real estate to her, to show a valid consideration therefor, where it is sought to set aside the conveyance for fraud); Sage v. Sage, 127 Ind. 15; s. c. 26 Northeast. Rep., 667 (in the prosecution of a husband as accessory to the murder of his child by his wife, the admission of evidence that the defendant and his wife were in a room by themselves does not violate the rule as to evidence of confidential communication between husband and wife). *Iowa*: Rea v. Jaffray, 1891, 48 Northwest. Rep., 78 (where a wife seeks to establish a claim against her insolvent

husband, the latter may testify as to the details of the transaction with his wife); *Head v. Thompson*, 77 Ia., 263; s. c. 42 Northwest. Rep., 188 (a wife's testimony as to what occurred between herself and husband before the execution of a deed is inadmissible). *Kansas*: *French v. Wade*, 35 Kan., 891; s. c. 11 Pacific Rep., 229 (a widow's testimony as to communications with her husband during marriage is inadmissible). *Massachusetts*: *Lyon v. Prouty*, 154 Mass., 488; s. c. 28 Northeast Rep., 908 (communications between husband and wife in the presence of third persons are not privileged); *Commonwealth v. Caponi*, 1892, 30 Northeast. Rep., 82 (only private conversations between husband and wife, and not written communications, are excluded by Mass. Pub. Stat., C. 169, § 18, subd. 1); *Commonwealth v. Hayes*, 1887, 14 Northeast. Rep., 151 (conversations between husband and wife relating to business in which one acted as the agent of the other are privileged); *Commonwealth v. Cleary*, 152 Mass., 491; s. c. 25 Northeast. Rep., 834 (upon the prosecution of a husband for the violation of the excise laws, where he claims that the business was carried on by his wife, he cannot testify that he showed her that he was opposed to the selling of liquor). *Missouri*: *King v. King*, 42 Mo. App., 454 (in a wife's suit for divorce for cruelty she cannot testify as to epithets spoken to her by defendant); *Henry v. Sneed*, 99 Mo., 407; s. c. 12 Southwest. Rep., 663 (in an action to enjoin for fraud the enforcement of a deed trust of the wife's lands, given to secure her husband's notes, both husband and wife may testify as to conversations between themselves which formed a part of the *res gestae*); *State v. Ulrich*, 1892, 19 Southwest. Rep., 656 (upon a trial for bigamy, letters by defendant to the woman, whom the indictment charges to be defendant's lawful wife, are inadmissible in evidence); *Stillwell v. Patton*, 1892, 18 Southwest. Rep., 1075 (a widow may testify as to her husband's signature from her knowledge of his handwriting acquired before marriage); *Hernon v. Triple Alliance*, 45 Mo. App., 426 (under Mo. R. S., 1889, § 8922, a widow, in an action upon an insurance policy upon her deceased husband's life, cannot testify as to the husband's acts and declarations in applying for the insurance). *New York*: *People v. Lewis*, 16 N. Y. Supp., 881 (communications between

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a husband and wife in the presence of third persons are not privileged, and the one may testify as to them against the other, even in criminal prosecutions); *Parkhurst v. Berdell*, 110 N. Y., 386; s. c. 18 Northeast. Rep., 123 (business communications between husband and wife, though made when they are alone together, are not privileged); *People v. Hayes*, 24 N. Y. Supp., 194 (a wife's letters to her husband, which were given by him to his mistress and produced by her on his trial for perjury, are not privileged). *Ohio*: *Lowther v. State*, 4 Ohio Cir. Ct. R., 522 (letters written by a husband to his wife, which were never delivered to her, but properly came into the hands of a third person, are admissible against the husband upon a criminal prosecution against him). *Pennsylvania*: *Brock v. Brock*, 1887, 9 Atlantic Rep. 486 (a divorced woman cannot testify as to confidential communications between herself and husband, made during the existence of their marriage). *South Carolina*: *State v. Turner*, 36 S. C., 534; s. c. 15 Southeast. Rep., 602 (where a husband voluntarily testifies as to a part of a communication made to him by his wife, he may be compelled to state the balance). *Texas*: *Mitchell v. Mitchell*, 15 Southwest. Rep. 705 (letters by a husband to a wife relating to business carried on by them are inadmissible in evidence). *United States*: *Bowman v. Patrick*, 32 Fed. Rep., 368 (where a wife's administrator delivered her husband's letters to a party in a suit in which the husband was interested to be used against him, *held*, that the letters were privileged); *Stickney v. Stickney*, 131 U. S., 227 (under U. S. R. S., § 876, relating to the Dist. of Columbia, in an action by a widow against her deceased husband's heirs to establish an alleged claim against his estate arising out of the investment by him of her property in his own name, the wife is competent, though not compellable, to testify as to the directions she gave her husband concerning the investment). *Utah*: *Bassett v. United States*, 137 U. S., 496 (under the Utah Code Civ. Pro., § 1156, a subsequent marriage by a married man is not a crime against the lawful wife, and cannot be proved by her evidence of his confessions to her). *Virginia*: *Thornton v. Gaar*, 1891, 12 Southeast. Rep., 753 (in an action by a husband's creditors to set aside a conveyance made by him to his wife, the wife is an

incompetent witness as to what took place between herself and husband). *Vermont*: Buckman's Will, 1892, 24 Atlantic Rep., 252 (a husband may testify as to business transactions with his wife, had in the presence of third persons); *State v. Mathers*, 1892, 23 *id.*, 590 (where a husband wrote an incriminating letter and gave it to his daughter to give to his wife, and the letter was taken from the messenger by another daughter, *held*, that the letter was admissible against the husband, and that the court would not inquire whether it had been legally obtained). *Washington*: Columbia, etc. R. Co. *v.* Hawthorn, Wash. T, 1888, 19 Pacific Rep., 25 (a husband who calls his wife as a witness waives the privilege). *West Virginia*: *Smith v. Turley*, 32 W. Va., 14; s. c. 9 Southeast. Rep., 46 (a wife is an incompetent witness to prove a personal transaction with her husband to show a resulting trust, not only as against his heirs, but also his creditors). *Wisconsin*: *Bigelow v. Sickles*, 75 Wis., 427; s. c. 44 Northwest. Rep., 761 (a husband is a competent witness against a former wife as to facts coming to his knowledge during marriage by means equally accessible to other persons, and which were not disclosed to him by conversations with his wife); *Selden v. State*, 74 Wis., 271; s. c. 42 Northwest. Rep., 218 (in a prosecution for perjury a husband's letters to his wife cannot be given in evidence against him, though only their dates and addresses are sought to be shown).

French v. Hall, 119 U. S., 152.

FRENCH v. HALL.

United States Supreme Court, November, 1886.

[Reported in 119 U. S., 152.]

An attorney, though acting as such on the trial of his client's cause, is a competent witness on behalf of his client.

If, after evidence in chief on behalf of both parties has been taken, the testimony of the attorney is offered in rebuttal, it is error to exclude it on the ground that the attorney is incompetent; even though the court might have excluded it in the exercise of its discretion because not offered as a part of the party's case in chief.

Plaintiff sued defendant for the value of his services as a broker in the sale of real property.

On the trial after defendant's evidence had been received, in the course of which defendant testified that he never had admitted the demand or promised to Mr. Carpenter, the plaintiff's attorney, that he would pay it, plaintiff offered his attorney, Carpenter, as a witness to prove such promise.

The trial court refused to allow Carpenter to be sworn as a witness for the plaintiff because he was acting as an attorney for the plaintiff in conducting the trial of the cause, to which ruling exception was taken.

Upon a motion for a new trial, the court expressed the opinion that Carpenter was in fact competent to testify as a witness for the plaintiff; but that his testimony was not offered at the proper time; that his testimony was receivable only in chief and upon the plaintiff's opening, and not in rebuttal; and this being the second trial of the cause, the plaintiff was not surprised by the testimony of the defendant, Hall, and it was his duty to give in chief and in his opening all evidence as to admissions by the defendant as well as other matters. For this reason the motion for a new trial was denied.

Plaintiff brought error.

HARLAN, J. [*after stating facts*]: The question for consideration is, whether the court erred in its ruling in not permitting the examination of the plaintiff's attorney as a witness on the plaintiff's behalf. It appears from the bill of exceptions that no objection was made to the examination of the witness by the defendant; the refusal to allow him to be sworn seems to have

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emanated from the court *sua sponte*, on the ground that he was acting as an attorney for the plaintiff in conducting the trial of the cause. There is nothing in the policy of the law, as there is no positive enactment which hinders the attorney of a party prosecuting or defending in a civil action from testifying at the call of his client. In some cases it may be unseemly, especially if counsel is in a position to comment on his own testimony, and the practice, therefore, may very properly be discouraged; but there are cases, also, in which it may be quite important, if not necessary, that the testimony should be admitted to prevent injustice or to redress wrong. Such seems, also, to have been the more deliberate opinion of the Circuit Court in this case, as it appears from the bill of exceptions that the refusal to grant a new trial for the alleged error in its ruling was justified, not on the ground that the witness was incompetent, but that his testimony was not offered at the proper time, being receivable only in chief upon the plaintiff's opening, and not in rebuttal.

This reason might have applied if the object of the testimony had been merely to prove an admission on the part of the defendant, and the offer had been rejected on that ground at the time, although it would be a strict application of the rule to require the plaintiff to assume in advance that the defendant would deny as a witness the truth of the plaintiff's case. But aside from that, the testimony seems to have been competent in rebuttal as a proof of a contradictory statement made by the defendant at another time and place, with a view to discrediting him as a witness. However that may be, and admitting that the testimony offered was strictly competent only in chief, nevertheless it was a matter of discretion with the court at the time of the trial whether the testimony should be admitted when offered after the defendant had testified.

The plaintiff was entitled to the exercise of that discretion on the part of the court at that time, which in the present case he was deprived of by the ruling of the court rejecting the offer of the testimony on another and an illegal ground. We are of the opinion that the court erred to the prejudice of the plaintiff in this respect. The judgment of the Circuit Court is therefore reversed, and the cause remanded, with directions to grant a new trial.

Root v. Wright, 84 N. Y., 72.

ROOT v. WRIGHT.

New York Court of Appeals, 1881.

[Reported in 84 N. Y., 72.]

The privilege which protects professional communications between attorney and client, is not abrogated by the removal of the incompetency of parties.*

The attorney cannot be allowed to disclose such a communication as evidence in a litigation between a client and a third person, even when the communication was made only in a matter of conveyancing, and was made to both parties to the transaction who jointly consulted him.

Appeal from a deficiency judgment on foreclosure.

At the trial before a referee, plaintiff relied on an assumption clause in the deed under which Wright had taken title.

The defense relied on showing that the deed was not an absolute conveyance, but was given and received merely as security for a debt, and therefore the assumption clause was not effectual.

To show the contrary, plaintiff called Mr. Howe, the attorney to whom the parties went after they had agreed on making the proposed deed as security.

The referee received the attorney's testimony against objection and exception.

The Supreme Court at General Term affirmed the judgment, being of opinion that the conversations and communications, so far as they consisted of the conversations of Wright, were not intended as confidential communications by Wright to his attorney and counsel, but were communications made, not only in the presence of the attorney, but in the presence of all the parties to the arrangement, and the only relation of attorney and client grew out of the fact that the attorney was employed to draw the papers between the three parties holding adverse interests in relation to the subject matter in respect to which the conversation sought to be proved by the attorney took place; such conversation is not privileged.

The Court of Appeals reversed the judgment.

* Even the accused in a criminal case, testifying as a witness in his own behalf, does not thereby waive his privilege against disclosure of confidential communications. But the authorities are in conflict. *Abb. Tr. Brief*, 241, § 404.

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ANDREWS, J. The liability of the defendant for the deficiency arising on the sale of the mortgaged premises turned upon the question, whether the deed from Foster was intended as an absolute conveyance, or simply as a mortgage. If it was intended as a security merely, the covenant thereon to assume and pay the plaintiff's mortgage, was in effect an agreement between Foster and the defendant that the latter should advance the amount of the prior lien upon the security of the land, and gave no right of action to the plaintiff, who was neither a party to the contract nor the person for whose benefit it was made. (*Garnsey v. Rogers*, 47 N. Y., 241; *Pardee v. Treat*, 82 *id.* 385.) The referee found that the deed was intended as an absolute conveyance, and to establish this view of the transaction, the plaintiff on the trial, called as a witness, the attorney who drew the deed, who was permitted, against the objection of the defendant, to testify to the conversation between Crosby, Foster and the defendant Wright, at his office, when the deed was drawn. The evidence of the attorney (who is also the attorney for the plaintiff in this action) was material upon the point in controversy. The general facts are, that on the morning of the day when the deed was drawn, and before the conversation at the attorney's office, Crosby, Foster and Wright had an interview. Foster was the owner of the land embraced in the plaintiff's mortgage, and the mortgagor, Crosby, held a junior mortgage on the same premises, which was due. Wright was liable as second indorser of a note upon which Foster was primarily liable, and Foster was also indebted to him for money advanced. Crosby was urging the payment of his mortgage, and at the interview between Crosby, Foster and Wright, it was proposed by Crosby, that Wright should take an assignment of his mortgage, and that Foster should execute to Wright a deed of the land as security for the payment of the sum he should advance to Crosby, and for his liability as indorser. This proposition was finally assented to by Wright and Foster, and the three persons by mutual agreement, then went to the office of the attorney to consummate the proposed arrangement. The arrangement as the attorney testifies, was there changed, and his evidence tends to show that it was agreed that Foster should convey to Wright by an absolute and indefeasible deed, and that

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Crosby, instead of assigning, should satisfy his mortgage upon payment thereof by Wright. The attorney was contradicted on material points by other witnesses, and the question is, whether the evidence of the attorney in respect to the transaction at his office was admissible.

The referee found that Wright, Foster and Crosby, after making the verbal agreement, went to the law office of the attorney, for the purpose of employing him professionally to draw the necessary papers to carry out that agreement, and that on the agreement being stated to him, it was changed by his advice. The rule that an attorney cannot disclose communications made to him by his clients is not, as now understood, confined to communications made in contemplation of, or in the progress of an action or judicial proceeding, but extends to communications in reference to all matters which are the proper subject of professional employment. (*Williams v. Fitch*, 18 N. Y., 550; *Yates v. Olmsted*, 56 *id.*, 632). The rule prohibiting such disclosure still exists, notwithstanding the change in the law permitting a party to an action to be examined as a witness on his own behalf, or at the instance of the adverse party, and is made a part of the statute law by section 835 of the Code of Civil Procedure. It is not necessary, in this case, to consider the question whether an attorney, employed as the common attorney of two or more parties to give advice in a matter in which they are mutually interested, can, on a litigation subsequently arising between them, be examined at the instance of one of the parties, as to communications made when he was acting as the attorney for both. (See *Whiting v. Barney*, 30 N. Y., 330.) However this may be, we are of opinion that he cannot disclose such communication in a controversy between such parties and a third person. Where parties, having diverse or hostile interests or claims which are the subject of controversy, unite in submitting the matter to a common attorney for his advice, they exhibit, in the strongest manner, their confidence in the attorney consulted. The law should encourage, and not discourage, such efforts for an amicable arrangement of differences, and public policy and the interests of justice are subserved by placing such communications under the seal of professional confidence to the extent at least of protecting

Root *v.* Wright, 84 N. Y., 72.

them against disclosure by the attorney at the instance of third parties. This position, if not directly adjudicated, is supported by the opinions of judges in several cases. (*Rice v. Rice*, 14 B. Monr., 417; *Robson v. Kemp*, 4 Esp., 233; *Same v. Same*, 5 *id.*, 52; *Strode v. Seaton*, 2 Ad. & El., 171; see, also, opinions of Grover, J., in *Britton v. Lorenz*, 45 N. Y., 57; Ingraham, J., in *Whiting v. Barnie*, 30 *id.*, 342; Smith, J., 38 Barb., 397.)

For the error in admitting the evidence referred to, the judgment should be reversed and a new trial granted.

All the judges concurred.

Judgment reversed.

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HURLBURT v. HURLBURT.

New York Court of Appeals, 1891.

[Reported in 128 N. Y., 420.]

The statute, N. Y. Code Civ. Pro., § 835—providing that an attorney shall not be allowed to disclose professional information received from, or advice given to his client—was not intended to change the common law rule.

When two or more persons together consult the same attorney for their mutual benefit, in a transaction between them the rule cannot be invoked in a litigation which may arise between them.

Neither can it be invoked in a litigation between their legal representatives if it could not have been between themselves while living.

The facts appear in the opinion.

EARL, J. This action was brought to recover the sum of \$6,682, with interest thereon, which, it is alleged, Charles F. Hurlburt, the plaintiff's intestate, placed in the hands of his son Theron, defendant's intestate, as his agent, and for his benefit, in the latter part of the year 1881. Theron was a son of Charles, and he died December 25, 1883, and Charles died January 6, 1884.

The defendant claimed that the money was a gift to her husband, and that he was never under any obligation to repay the same. The plaintiffs were unable to produce any writing of any kind evidencing any obligation on the part of Theron to repay the money. They are the sons of Charles, and were the sole witnesses to establish their claim, and this they attempted to do by testifying to certain conversations which they overheard between their father and Theron.

Upon the trial, the defendant rested her case mainly upon the conceded fact that for about two years before the death of her husband, the money claimed had been in banks to his credit, and had been managed and controlled by him, and she produced proof of certain declarations and admissions made by Charles, tending to show that the money was transferred by him to his son as a gift, and not to be held for his benefit.

During the progress of the trial the plaintiffs made objections to evidence, which were overruled, and they now claim some of

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the rulings were erroneous. We will briefly notice some of them.

Theron and Charles, in the spring of 1883, went together to consult a lawyer by the name of Aldrich, as to the best mode of disposing of or adjusting the prospective interest of the plaintiff Lyman, as an heir, in the farm belonging to his father, and several plans were suggested by Theron in the presence of his father, and assented to by him to accomplish that end. The statement was there made by Theron to the lawyer, and assented to by his father, that Lyman had had all his share in his father's personal property; and other statements were there made by Theron and assented to by his father, of similar import. Aldrich was called by the defendant to prove these statements and admissions. The plaintiffs objected to his evidence on the ground that he was an attorney consulted professionally, and that the communications to him were privileged. The court overruled the objection and received the evidence.

We think that in receiving this evidence there was no violation of section 835 of the Code, which provides that "an attorney or counsellor at law shall not be allowed to disclose a communication made by his client to him, or his advice given thereon, in the course of his professional employment." This section is a mere re-enactment of the common law rule, and it cannot be supposed from the general language used, that it was intended to change or enlarge that rule as it had been expounded by the courts. It has frequently been said that the object of the rule embodied in the section is to enable and encourage persons needing professional advice to disclose freely the facts in reference to which they seek advice, without fear that such facts will be made public to their disgrace or detriment by their attorney. Such a case as this is plainly not within the rule. Here Theron and his father were both interested in the advice which they sought, and they were both present at the same time and engaged in the same conversation. Each heard what the other said, so that the disclosures made, were not, as between them, confidential; and there can be no reason for treating such disclosures as privileged. It has frequently been held that the privilege secured by this rule of law does not apply to a case

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where two or more persons consult an attorney for their mutual benefit, that it cannot be invoked in any litigation which may thereafter arise between such persons, but can be in a litigation between them and strangers. (Root v. Wright, 21 Hun, 347; * Sherman v. Scott, 27 *id.*, 331; Foster v. Wilkinson, 37 *id.*, 244; Rosenburg v. Rosenburg, 40 *id.*, 91; Whiting v. Barney, 30 N. Y., 330; Hebbard v. Haughian, 70 *id.*, 54; Root v. Wright, 84 *id.*, 72.) Therefore, if Charles and Theron had been alive and parties to this action, this evidence would have been competent. And as it would then have been competent, it is equally competent in this action between their personal representatives. The fact that these plaintiffs are personally interested in the estate of their father can make no difference in the application of the rule. They are parties to this action only in a representative capacity. They legally stand as the representatives of their father and no one else. Evidence which would have been competent against him in his life-time, is competent against his personal representatives. So we think that this case is not within the reason of section 835, and even if it should be regarded as within its letter, it should be taken out of the letter by the application of the familiar maxim "*Cessante ratione legis cessat ipsa lex.*"

[Rulings on other questions are here omitted.]

All the judges concurred.

Judgment affirmed.

* See reversal of that case at p. 80 of these cases.

NOTE ON CONFIDENTIAL COMMUNICATIONS BETWEEN ATTORNEY AND CLIENT.

Advice to aid commission of crime.

In *Bank of Utica v. Mersereau*, 3 Barb., Ch. 528, the deposition of the attorney, who had prepared a confession of judgment, was suppressed by the chancellor. The testimony related to declarations of the client tending to show that the object of giving the judgment was to hinder and delay their creditors, and that it was given for a much larger sum than was justly due. The chancellor held, that the fact that the attorney must have known the transaction was a fraud on the creditors, did not deprive the client's communication of the privilege, but, in passing on this point, said (p. 598): "The seal of professional confidence, I believe, has never been held to cover a communication made to an attorney to obtain professional advice or assistance as to the commission of a felony or other crime which was *malum in se*. The opinion of Chief Baron Gilbert was that the privilege of attorney and counsel did not extend to such cases (1 Gilb. Ev., 277)."

Disclosure of Client's Address. Information of this character, when desired for the purpose of effecting personal service of a process or order in the cause, is not privileged. The court may require the attorney to disclose his client's address, upon an application by the adverse party showing the necessity for personal service, his unsuccessful efforts to make such service, and the refusal of the attorney, upon request, to disclose the client's address. See *Note in 26 Abb. N. C., 118*.

For recent cases on the Relation; its Cessation; What Communications are privileged; Who May Insist on the privilege; the Manner of Objecting, and Waiver of the privilege; see the following:

The Relation:

Alabama: *Hawes v. State*, 88 Ala., 37; s. c. 7 Southern Rep., 302 (communications to an attorney's confidential clerk by

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one who does not know his relation to the attorney, and who expresses no desire to have his communications conveyed to the attorney, are not privileged). *California*: *Sharon v. Sharon*, 79 Cal., 633; s. c. 22 Pacific Rep., 26 (communications to an attorney are not privileged unless he is the attorney for the party by whom they are made, and they are made to him in the course of his professional employment). *Colorado*: *Caldwell v. Davis*, 1887, 15 Pacific Rep., 696 (an attorney, who merely draws up a deed, and does not act as an adviser, may testify as to the conversation between the parties at the time of execution). *Dakota*: *O'Neil v. Murray*, 6 Dak., 107; s. c. 50 Northwest Rep., 69 (an attorney only employed to draw up a bill of sale and deed for vendee may testify in vendor's behalf as to what took place for the purpose of showing that a mortgage was intended). *Georgia*: *Fire Ass'n. v. Fleming*, 1887, 3 Southeast. Rep., 420 (the privilege extends to communications between the attorney of a corporation and its agent); *Rodgers v. Moore*, 88 Ga., 88; s. c. 10 Southeast. Rep., 962 (where an attorney was only employed to procure a bond for defendant in a criminal case, held that he was a competent witness concerning a subsequent transfer of property by defendant made to secure the bond). *Illinois*: *Tyler v. Tyler*, 126 Ill., 525; s. c. 21 Northeast. Rep., 616 (the attorney for the assignee is competent to testify as to assignor's statements made upon the execution of the assignment). *Indiana*: *Thomas v. Griffin*, Ind. App., 1891, 27 Northeast. Rep., 754 (an attorney, who acted merely as a scrivener, may testify as to the contents of the instrument); *Bingham v. Walk*, 1891, 27 Northeast. Rep., 483 (where a husband called upon an attorney and asks him to draw a contract for his wife, the wife and not the husband is the client, and the attorney may testify as to the transaction with her permission); *Piper v. Fisher*, 121 Ind., 407; 23 Northeast. Rep., 269 (an attorney, who is present and only advises one of the parties as to the making of a contract, but who does not act as an agent, is not incompetent as a witness of what took place under Ind. R. S., 1881, § 500). *Iowa*: *Theisen v. Dayton*, 47 Northwest. Rep., 891 (communications to an attorney, who declines to act, are not privileged). *Kentucky*: *Carter v. West*, 1892, 19 Southwest. Rep.,

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592 (an attorney employed by one of the parties to see that she got good title, cannot testify in behalf of the other party as to what took place between them when the deed was being drawn). *Michigan*: *Dikeman v. Arnold*, 1890, 44 Northwest. Rep., 407 (a conveyancer, who draws a deed, though also an attorney, is a competent witness as to what transpired while the deed was being drafted). *Missouri*: *Tyler v. Hall*, 106 Mo., 313; s. c. 17 Southwest. Rep., 319 (where an administrator, accompanied by deceased's son, consulted his attorney as to a deed, which he had found, of deceased to his son. *Held*, that though the administrator required the son to repay him what he paid for the consultation, the administrator was competent to testify to what the son said on such consultation). *Nevada*: (communications as to a fictitious case are not privileged). *New Hampshire*: *State v. Merchant*, 1889, 18 Atlantic Rep., 654 (on the trial for an assault a third person's attorney, who was employed to transact certain business with the defendant, may testify that defendant used threatening language towards the assaulted person). *New York*: *Loder v. Whelpley*, 111 N. Y., 239; s. c. 18 Northeast. Rep., 874 (an attorney, who receives directions as to a will acts in a professional capacity, though he merely reduces the directions to writing without questioning or advising); *Matter of Smith*, 15 N. Y. Supp., 425 (an attorney acting as a draughtsman of a will, may testify as to testator's statements made in the presence of the attorney and subscribing witnesses); *Matter of Monroe*, 20 *id.*, 82 (communications to an attorney giving free advice are not privileged); *People v. Gilon*, 18 Civ. Pro. R., 109; s. c. 9 N. Y. Supp., 243 (the advice of the corporation counsel of New York City to the board of assessors is privileged); *Avery v. Mattee*, 9 N. Y. Supp., 166 (communications to an attorney are not privileged, where he refuses to act); *Haulenbeck v. McGibbon*, 14 *id.*, 393 (an attorney, who acts for both parties without compensation, is a competent witness as to what took place); *Sheldon v. Sheldon*, 11 *id.*, 477 (an attorney, who draws a deed by which the wife sells her separate estate, may testify as to what the husband said when the deed was drawn, for the purpose of showing that the wife had given the proceeds of the sale to the husband, since deceased, so that he might invest it for her).

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Ohio: *Benedict v. State*, 1887, 11 Northeast. Rep., 125 (communications to one who acts as a legal adviser and who practices before a justice of the peace, though not admitted as an attorney, are privileged). *Pennsylvania*: *Dierstein v. Schubkagel*, 131 Pa. St., 46; s. c. 18 Atlantic Rep., 1059 (communications to a law student are not privileged). *Texas*: *Stallings v. Hullum*, 79 Tex., 421; s. c. 15 Southwest. Rep., 677 (communications to an abstractor and an attorney employed only to search a title and to make an abstract, without any view to obtaining advice are not privileged); *Simmon's Hardware Co. v. Kaufman*, 1888, 8 Southwest. Rep., 283 (negotiations with an attorney, who acts for another, are not privileged). *United States*: *Brungger v. Smith*, 49 Fed. Rep., 124 (the privilege does not apply to communications to a solicitor of patents, who is not an attorney). *Virginia*: *Hall v. Rixey*, 1888, 6 Southeast. Rep., 215 (communications by an assignor to an attorney, who was acting for the assignee, are not privileged). *Wisconsin*: *Plane Manufg. Co. v. Frawley*, 1887, 32 Northwest. Rep., 768 (statements made to an attorney by a person after he has been advised that the attorney could not act for him, are not privileged).

Cessation of the Relation:

Doherty v. O'Callaghan, Mass., 1892, 31 Northeast. Rep., 726 (after testator's death, the attorney, who drew his will, may testify as to the directions given him); but compare *Loder v. Whelpley*, 111 N. Y., 229. *Wadd v. Hazleton*, 17 N. Y. Supp., 410 (after severing his relation with an attorney employed to draw his will, the testator casually told him on a subsequent occasion that he proposed to give an additional sum to a certain legatee. *Held*, that this was not a confidential communication). *Morris v. Cain*, La., 1887, 1 Southern Rep., 797 (an attorney may not testify without his client's consent, though the relation has ceased). *Walter v. Fairchild*, 4 N. Y. Supp., 552 (though the litigation has ceased, plaintiff's attorney cannot be compelled to disclose the address of his late client). *Peek v. Boone*, Ga., 1893, 17 Southeast. Rep., 66 (a communication to an attorney, who is consulted but who is not subsequently employed to perform the service, is privileged).

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What Communications are or are not Privileged:

Alabama: Chapman v. Peebles, 1888, 4 Southern Rep., 273 (an attorney may be compelled to testify as to whether he wrote a note signed by his client, and paid him a certain sum of money on the same; as such evidence relates to facts and not professional communications); White v. State, 86 Ala., 69; s. c. 5 Southern Rep., 674 (in a prosecution for attempting to obtain money upon false pretenses from a railroad company, an attorney may testify that he was employed by defendant to demand compensation from the company). *California:* Ferguson v. McBean, 91 Cal., 63; s. c. 27 Pacific Rep., 518 (a communication to an attorney which his client intends he shall impart to another is not privileged); Bauer's Estate, 79 Cal., 304; s. c. 21 Pacific Rep., 759 (an attorney who drew a homestead declaration for both husband and wife may testify as to the transaction in a contest between the deceased husband's legatees and the widow). *Georgia:* Skellie v. James, 81 Ga., 419; s. c. 8 Southeast. Rep., 607 (under Ga. Acts, 1887, p. 30, an attorney may be compelled to testify). *Illinois:* Griffin v. Griffin, 1888, 17 Northeast. Rep., 782 (communications to an attorney by both parties in the presence of each other, are not confidential); Swain v. Humphreys, 42 Ill. App., 370 (an attorney may testify as to the issuing of an execution upon a judgment for client). *Indiana:* Hanlow v. Doherty, 1887, 9 Northeast. Rep., 782 (communications to an attorney acting for both parties are not privileged); s. p. Colt v. McComel, 116 Ind., 249; s. c. 19 Northeast. Rep., 106; Bruce v. Osgood, 1888, 14 Northeast. Rep., 563 (statements made by a client to his attorney to be communicated to others are not privileged); Harrisburg Car Manuf'g Co. v. Sloan, 1889, 21 Northeast. Rep., 1088 (an attorney will not be compelled to produce client's papers); Lloyd v. Davis, 2 Ind. App., 170; s. c. 28 Northeast. Rep., 232 (an attorney may testify as to communications with his client, not connected with the action in which he is employed). *Kansas:* Tays v. Carr, 1887, 14 Pacific Rep., 456 (attorney may not testify as to professional communications without his client's consent); Sparks v. Sparks, 1893, 32 *id.*, 892 (communications to an attorney in the presence of both parties

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are not privileged). *Massachusetts*: Blount v. Kimpton, 1892, 29 Northeast. Rep., 590 (the fact that the communication between an attorney and client was made in the presence of a third person, does not make the attorney a competent witness as to what took place). *Michigan*: Riley v. Conner, 1890, 44 Northwest. Rep., 1040 (in replevin for a mortgaged chattel, statements which the mortgagee's attorneys made to him while he was seeking their advice are inadmissible); Erickson v. Milwaukee, etc. Ry. Co., 93 Mich., 414; s. c. 53 Northwest. Rep., 393 (where plaintiff is called as a witness, his attorney cannot be compelled to testify as to conversation with plaintiff as to his testimony); House v. House, 61 Mich., 69; s. c. 27 Northwest. Rep., 858 (where two brothers went to an attorney for the purpose of having him draw up a power of attorney for the purpose of enabling their father to make certain collections for them, the attorney may testify that one of the brothers stated to the other that he intended that his father should have the moneys collected; since such statement was not necessary to enable the attorney to give advice); Cady v. Walker, 62 Mich., 157; s. c. 28 Northwest. Rep., 865 (an attorney's advice to both parties to a controversy is not privileged as against each other). *Minnesota*: Hanson v. Bean, 1893, 53 Northwest. Rep., 871 (what was said between the parties to a mortgage in the hearing of the attorney who was employed to draft it, but which was not intended as a communication to the attorney, is not privileged); State v. Tall, 43 Minn., 273; s. c. 45 Northwest. Rep., 449 (a client may be questioned as to his statements to attorney); Stokoe v. St. Paul, etc. Ry. Co., 40 Minn., 545; s. c. 42 Northwest. Rep., 545 (an attorney will not be compelled to produce his client's papers). *Missouri*: State v. Dawson, 90 Mo., 149; s. c. 1 Southwest. Rep., 827 (where a defendant is charged with stealing \$160, in silver, his attorney cannot be called upon to testify in what kind of money his fees were paid); Hickman v. Green, 1893, 22 *id.*, 455 (communications to an attorney concerning proposed infractions of the law are not privileged); Denser v. Walkup, 43 Mo. App., 625 (communications by client to attorney in the presence of the adverse party are not privileged); Koontz v. Owens, 1892, 18 Southwest. Rep., 928 (communications to an at-

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torney employed to draw a will relative to the amount of land which testator intended to convey by a certain deed are inadmissible after testator's death in an action to reform the deed). *Nebraska*: *Nelson v. Becker*, 1891, 48 Northwest. Rep., 962 (in an action by an attorney for services, his client's letters, written for the purpose of employing him, are inadmissible). *New Jersey*: *Matthews v. Hoagland*, 1891, 21 Atlantic Rep., 1054 (privilege extends to information acquired by an attorney from documents which his client submits to him for inspection or custody; but communications with an attorney for a criminal or fraudulent object are not privileged). *New York*: *Hurlburt v. Hurlburt*, 128 N. Y., 420; s. c. 26 Northeast. Rep., 651 (where two persons go together to the same attorney for advice as to matters in which they are equally interested, the subjects discussed and advice given are not privileged); s. p. *Hard v. Ashley*, 44 State Rep., 792; s. c. 18 N. Y. Supp., 413; *Smith v. Crego*, 7 N. Y. Supp., 86; *Greer v. Greer*, 58 Hun, 251; s. c. 12 N. Y. Supp., 778; 20 Civ. Pro. R., 71 (transactions between attorney and client in the presence of third persons are not privileged); *Bartlett v. Bunn*, 56 Hun, 507; s. c. 10 N. Y. Supp., 210 (plaintiff's communications to his attorney with the purpose of having them published to defendant are not privileged); *Rosseau v. Bleau*, 131 N. Y., 177; s. c. 30 Northeast. Rep., 52 (an attorney may testify that his deceased client gave him a deed with instructions to deliver it to the grantee); *Matter of Mellen*, 18 N. Y. Supp., 515 (communications by a third person to whom client refers attorney are not privileged); *Barry v. Coville*, 7 *id.*, 36 (an attorney may testify merely as to the fact of drawing deed for client); *Martin v. Platt*, 51 Hun, 429; s. c. 4 N. Y. Supp., 359 (an attorney may testify that by his client's direction, he employed plaintiff to do the work sued for); *Hampton v. Boylen*, 46 Hun., 151 (in an action against a constable for failing to return an execution, plaintiff's attorney may testify for defendant that he directed him not to levy the execution and that he had control of it); *Holthausen v. Pondir*, 55 N. Y. Super. Ct., 73 (an attorney may testify as to his client's handwriting); *Matter of McCarthy*, 55 Hun, 7; s. c. 8 N. Y. Supp., 578 (an attorney who drew a will is not incompetent to testify as to conversations

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with testator at the execution of the will in the presence of the subscribing witnesses; and he may also testify that he received his instructions relative to the provisions of the will from the testator); but see s. c. on subsequent appeal, 65 Hun, 512; s. c. 48 State Rep., 301; Matter of O'Neil, 7 *id.*, 197; s. c. 26 State Rep., 242 (an attorney cannot testify as to acts and words of his client relative to his will or its execution); *Eastman v. Kelly*, 1 N. Y. Supp., 866 (an attorney may be asked if he is not interested in the action to the extent of a share in the recovery); Matter of Whitlock, 51 Hun, 351; s. c. 3 N. Y. Supp., 855 (an attorney will not be compelled to produce his client's papers); *Chellis v. Chapman*, 7 *id.*, 78 (in an action for breach of promise to marry, defendant may be asked whether he gave all of plaintiff's letters to him to his attorney); see following cases as to general rule, that communications by a client to an attorney are privileged; Matter of McCarthy, 14 N. Y. Supp., 2; *Mason v. Williams*, 53 Hun, 398; *McIntyre v. Costello*, 6 N. Y. Supp., 397; *Ney v. City of Troy*, 3 *id.*, 679; *Eastman v. Kelly*, 1 *id.*, 866. *North Carolina*: *Grant v. Hughes*, 1887, 2 Southeast. Rep., 339 (in an action against an administrator for a fraudulent settlement of the estate, the attorney who collected for him certain notes belonging to the estate may testify as to the terms of such collections); *Carey v. Carey*, 108 N. C., 267; s. c. 12 Southeast. Rep., 1038 (communications between attorney and client in the presence of the adverse party, are not privileged); s. p. *Hughes v. Boone*, 102 N. C., 137; s. c. 9 Southeast. Rep., 286; *Michael v. Foil*, 1888, 8 *id.*, 264 (an attorney who drew the deed may testify as to what took place between the grantor and the grantee, whether he acted for one or both). *Oregon*: *State v. Gleason*, 1890, 23 Pacific Rep., 817 (where, in supplementary proceedings, defendant's attorney testifies that after the action was begun he had in his possession certain property of defendants, he may be required to specify what he had, and what he did with it). *Pennsylvania*: *Kant v. Kessler*, 1887, 7 Atlantic Rep., 586 (knowledge acquired by an attorney from direct verbal utterances of his client, is privileged); Appeal of Goodwin, etc. Meter Co., 1888, 12 *id.*, 736 (communications by two parties to an attorney acting for both, are not con-

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fidential); Weaver's Estate, 9 Pa. Co. Ct. R., 516 (an attorney may testify as to what took place between two persons in his office, though both were clients). *Texas*: Rahm v. State, 1892, 17 Southwest. Rep., 416 (the attorney for one, charged with perjury for swearing that he did not sign an order, may testify that defendant did sign it); Everett v. State, Tex. App., 1892, 18 Southwest. Rep., 674 (upon trial for murder, deceased's attorney may testify that deceased inquired of him how he could kill defendant so as to avoid legal consequences); Orman v. State, 1888, 6 *id.*, 544 (upon a murder trial an attorney may testify that defendant consulted him as to the penalty of killing deceased). *United States*: Alexander v. U. S., 138 U. S., 353 (upon a murder trial an attorney cannot testify as to defendant's consultation with him as to the former's rights over partnership property, owing to the disappearance of his partner, the deceased); Edison Electric L. Co. v. U. S. Electric L. Co., 44 Fed. Rep., 294 (non-compliance with a subpoena *duces tecum* cannot be excused by showing that the witness had delivered the documents, unprivileged in his own hands to his attorney). *Vermont*: Arbuckle v. Templeton, 1893, 25 Atlantic Rep., 1095 (an attorney cannot testify as to the indorsement on a note which his client has shown to him); Hick's Estate v. Blanchard 1888, 15 Atlantic Rep., 401 (an attorney who acted for plaintiff cannot testify in behalf of defendant that he furnished defendant with a specification of plaintiff's claim, materially different from that on file). *Wisconsin*: Selden v. State, 74 Wis., 271; s. c. 42 Northwest. Rep., 218 (on husband's trial for perjury his wife's attorney cannot produce the husband's letters to her in his possession, without her consent, even if the giving of such letters in evidence did not violate the rule as to confidential communications between husband and wife); C. Aultman & Co. v. Ritter, 1892, 5 Northwest. Rep., 569 (an attorney may testify in behalf of another and against his client that he received a check from the latter with which to make a payment for him, and that he made the payment); Plano Manuf'g Co. v. Frawley, 1887, 32 *id.*, 768 (an attorney may testify against his client as to the existence of a matter of fact).

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Who may Insist upon the Privilege :

Laymon's Will, 40 Minn., 371 ; s. c. 42 Northwest. Rep., 286 (upon a contested probate proceeding, a contestant and heir at law cannot object to the testimony of testator's attorney as to his communications with deceased upon business matters where the object of the testimony is to show the testator's capacity, and does not, in any way, reflect on his character). *Gruber v. Baker*, 20 Nev., 453 ; s. c. 23 Pacific Rep., 453 (an attorney employed by several parties to draw a deed is an incompetent witness as to communications in relation thereto, in a controversy between one of the parties and a third person). *Matter of Mellen*, 18 N. Y. Supp., 515 (an attorney cannot raise the objection where the person, whom he claims as a client, disclaims the relation). *McNulty's Appeal*, Pa., 1890, 19 Atlantic Rep., 936 (a third person cannot object to the disclosure of confidential communications by an attorney). *Smith v. Wilson*, 1 Tex. Civ. App., 115 ; s. c. 20 Southwest. Rep., 1119 (the privilege is personal to the client and cannot be claimed by his adversary).

Manner of Objecting :

California : *Sharon v. Sharon*, 79 Cal., 633 ; s. c. 22 Pacific Rep., 26 (the burden is on the objecting party to show that communication is within the statute). *Georgia :* *Brown v. Matthews*, Ga., 1887, 4 Southeast. Rep., 13 (in order to exclude communications on the ground that they were made to an attorney, the relation of attorney and client must be manifest). *New Jersey :* *Matthews v. Hoagland*, N. J., 1891, 21 Atlantic Rep., 1054 (in a civil suit the first test as to whether the communication between an attorney and client involved a purpose which was or was not tainted with fraud as affecting the privilege, is the issue as made by the pleading in the cause). *New York :* *Brennan v. Hall*, 131 N. Y., 160 ; s. c. 29 Northeast. Rep., 1009 (where an attorney is questioned as to a conversation between his client and a third person, his testimony being competent as to the statements of the latter, an objection to his testifying as to the entire conversation is too broad). *McClure v. Goodenough*, 19 Civ. Pro. R., 191 ; s. c. 12 N. Y. Supp., 459

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(where an attorney, as a witness, states that professional communications are involved, he will be excused from answering). *North Carolina*: *Hughes v. Boone*, 102 N. C., 137; s. c. 9 Southeast. Rep., 286 (it is for the court to determine whether communications to an attorney are privileged, and for this purpose it may inspect documents drawn by him). *Texas*: *Harris v. Daugherty*, Tex., 1889, 11 Southeast. Rep., 921 (where the evidence is conflicting as to whether an attorney was employed, the admissibility of communications to him is to be determined by the court).

Waiver:

Georgia: *Lewis v. State*, 1893, 16 Southeast. Rep., 986 (a client cannot call his attorney to testify as to a confidential communication made to him). *Fire Assn. v. Fleming*, 1887, 3 Southeast. Rep., 420 (the fact that evidence as to confidential communications between attorney and client has been wrongfully admitted on a former trial, does not justify a repetition of the error on a second trial). *Michigan*: *People v. Hillhouse*, 1890, 45 Northwest. Rep., 484 (though defendant, in a prosecution for larceny, testifies that his attorney advised him that he could take the property, if he could do so peaceably, the attorney cannot be called to testify as to what advice he gave); *People v. Gallagher*, 75 Mich., 512; s. c. 42 Northwest. Rep., 1063 (statements to his attorney by one who has admitted his connection with a crime and testifies against his accomplices, are not privileged communications, but the testimony of the attorney may be admitted to impeach such witness). *Mississippi*: *Jones v. State*, 1888, 3 Southern Rep., 379 (an accomplice, who has turned State's evidence, waives all privileges as to the facts pertinent to the issue, and may be compelled to testify as to consultations with his attorney). *New York*: *Matter of Coleman*, 111 N. Y., 220; s. c. 19 Northeast. Rep., 71 (a testator by requesting an attorney to become a subscribing witness to his will waives the privilege so as to permit the attorney after the testator's death to testify in proceedings to probate the will as to his instructions for drawing the will); s. p. *Matter of Lamb*, 21 Civ. Pro. R., 324; s. c. 18 N. Y. Supp., 173; *Matter of*

Note on Professional Communications with Attorney.

Gagan, 21 *id.*, 350; Loder *v.* Whelpley, 111 N. Y., 239; s. c. 18 Northeast. Rep., 874 (in a probate proceeding the privilege as to communications by testator to his attorney cannot be waived by the executor or any one else); Mutual Life Ins. Co. *v.* Corey, 54 Hun, 493; s. c. 7 N. Y. Supp., 939 (a notary is competent to testify as to the acknowledgment of a deed, though he was attorney for the grantor); Masterton *v.* Boyce, 6 *id.*, 65 (a client may waive the privilege by himself, examining his attorney as a witness; s. p. Smith *v.* Crego, 7 *id.*, 86). *South Carolina*: Brazel *v.* Fair, 2 Southeast. Rep., 293 (an attorney who witnessed a declaration of trust drawn by himself is a competent witness to prove the consideration); State *v.* James, 1891, 12 *id.*, 657 (though a conspirator, who turned State's evidence, denied on cross-examination, that he had ever told his attorney that a confession had been procured from him by threats, his attorney cannot be compelled to disclose what was said in order to impeach him). *United States*: Hunt *v.* Blackburn, 1888, 8 Supm. Ct., 125 (where a defendant, who alleges that she was deceived by her attorney, testifies in relation thereto, she cannot object to the testimony of the attorney upon the same matter); Liggett *v.* Glenn, 2 U. S. Cir. Ct. App., 286; s. c. 51 Fed. Rep., 381 (a contract by which shareholders employed an attorney, and which had been filed by the attorney in the Probate Court as a voucher for a claim for fees against one of his deceased clients, cannot be offered in evidence by third persons in an action against the clients to show that they were shareholders; since no matter how the plaintiffs obtained possession of the document, it could not be deprived of its character as a privileged communication without some unequivocal act on the part of the clients themselves). *Wisconsin*: Matter of Pitt's Estate, 1893, 55 Northwest. Rep., 149 (in an action to contest a will, testator's attorney who witnessed the will may testify as to any fact in regard to it, or its execution, which he learned by virtue of his professional relation).

Connecticut Life Ins. Co. v. Union Trust Co., 112 U. S., 250.

CONNECTICUT LIFE INS. CO. v. UNION TRUST CO.

United States Supreme Court, November, 1884.

[Reported in 112 U. S., 250.]

The act of Congress (U. S. R. S., § 721)—which makes the laws of the several states rules of decision on trials at common law* in the federal courts,—require those courts to enforce in such actions the exclusion by a state statute (for example, N. Y. Code Civ. Pro., § 834) excluding information acquired by a physician or surgeon in professionally attending a patient, and which was necessary to enable him to act in that capacity.

Hence, under such a statute, the physician of the deceased cannot in an action on a life policy testify to the cause of death as learned by him in that way.

The widow of the deceased cannot, in an action on a life policy, be asked as a witness “Did you understand from your husband the nature of the disease?” for the question calls for what may be nothing more than the operation of her mind.

Action on a life policy.

The facts appear in the opinion.

After judgment for plaintiff, defendant brought error.

HARLAN, J. [*after stating facts*]: 1. In support of the defence, physicians, who had attended the insured professionally, were examined as witnesses, and the first assignment of error relates to the refusal of the court to permit them to answer questions, the object of which was to elicit information which would not have been allowed to go to the jury under section 834 of the Code of Civil Procedure of New York, had the action been tried in one of the courts of the state. That section provides that “a person, duly authorized to practice physic or surgery, shall not be allowed to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity.” It is not, and could not well be, seriously questioned, that the evidence excluded by the Circuit Court was inadmissible under the rule prescribed by that section. *Grattan v Metropolitan*

* As to equity and admiralty, see U. S. R. S. § 914.

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Life Ins. Co., 92 N. Y., 274; Same v. Same, 80 N. Y., 281; Pierson v. People, 79 N. Y., 424; Edington v. Aetna Life Ins. Co., 77 N. Y., 564; Edington v. Mutual Life Ins. Co., 67 N. Y., 185.

But it is suggested that truth and justice require the admission of evidence which this statutory rule, rigorously enforced, would exclude, and that it can be admitted without disturbing the relations of confidence properly existing between physician and patient; that it would not afflict the living nor reflect upon the dead, if the physician should testify that his patient had died from a fever, or an affection of the liver; and that the rule, as now understood and applied in the courts of New York, shuts out, in actions upon life policies, the most satisfactory evidence of the existence of disease, and of the cause of death. These considerations, not without weight, so far as the policy of such legislation is concerned, are proper to be addressed to the legislature of that state. But they cannot control the interpretation of the statute, where its words are so plain and unambiguous as to exclude the consideration of extrinsic circumstances. Since it is for that state to determine the rules of evidence to be observed in the courts of her own creation, the only question is whether the Circuit Court of the United States is required, by the statutes governing its proceedings, to enforce the foregoing provision of the New York Code. This question must be answered in the affirmative. By § 721 of the Revised Statutes, which is a reproduction of § 34 of the Judiciary Act of 1789, it is declared that "the laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply." This has been uniformly construed as requiring the courts of the union, in the trial of all civil cases at common law, not within the exceptions named, to observe, as rules of decision, the rules of evidence prescribed by the laws of the states in which such courts are held. *Potter v. National Bank*, 102 U. S., 165; *Vance v. Campbell*, 1 Black, 427; *Wright v. Bales*, 2 Black, 535; *McNeil v. Holbrook*, 12 Pet., 84; *Sims v. Hundley*, 6 How., 1.

There is no ground for the suggestion that §§ 721, 858 and 914 of the Revised Statutes may be construed as relating to the competency of witnesses rather than to the nature and principles of evidence. While in some of the cases the question was whether a witness, competent under the laws of a state, was not, for that reason, under § 34 of the act of 1789, a competent witness in the courts of the United States sitting within the same state, in others the question had reference to the intrinsic nature of the evidence introduced. In *McNeil v. Holbrook* the court held the courts of the United States, sitting in Georgia, to be bound by a statute of that state declaring, as a rule of evidence, that in all cases brought by an indorser or assignor on any bill, bond, or note, the assignment or indorsement, without regard to its form, should be sufficient evidence of the transfer thereof; the bond, bill, or note to be admitted as evidence without the necessity of proving the handwriting of the assignor or indorser. And in *Sims v. Hundley* a notary's certificate, held to be inadmissible as evidence under the principles of general law, was admitted upon the ground that, having been made competent by a statute of Mississippi, it was competent evidence in the Circuit Court of the United States sitting in that state.

We perceive nothing, in the other sections of the Revised Statutes, to which attention is called, that modifies § 721, except that, by § 858, the courts of the United States, whatever may be the local law, must be guided by the rule that "no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried;" and by the further rule, that, "in actions by or against executors, administrators, or guardians in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with, or statement by, the testator, intestate or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court." "In all other respects," the section proceeds, "the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty." As to § 914, it is sufficient to say that it does not modify § 721 in so

far as the latter makes it the duty of the courts of the United States in trials at common law, to enforce—except where the laws of the United States otherwise provide—the rules of evidence prescribed by the laws of the state in which they sit.

For these reasons, it is clear that the Circuit Court properly refused to permit physicians called as witnesses to disclose information acquired by them while in professional attendance upon the insured, and which was necessary to enable them to act in that capacity.

2. The widow of the insured having been called as a witness on behalf of the company, it is contended that the court erred in not allowing her to answer this question: "Did you not understand from your husband the nature of the disease?" That question, it is claimed, called for information derived from the insured as to the nature of any disease under which he may have been suffering at a particular time prior to his application. If she was a competent witness, and if the statements of the insured to her were admissible upon the issue whether he had concealed any fact in his personal history or condition with which the company ought to have been made acquainted, or upon the issue whether he had made fair and true answers to the questions put to him, still the question did not call for his statements, but only as to what the witness understood from him as to the nature of his disease. Her statement of what she understood may not have been justified by what the insured actually said, and may have been nothing more than the unwarranted deduction of her own mind. The objection to the question was properly sustained.

[Rulings on other subjects are here omitted.]

Judgment affirmed.

Edington v. Mutual Life Ins. Co., 67 N. Y., 185.

EDINGTON v. MUTUAL LIFE INS. CO.

New York Court of Appeals, November, 1876.

[Reported in 67 N. Y., 185.]

The statute, 2 N. Y. R. S. 406, § 73 (same continued in N. Y. Code Civ. Pro., § 834)—providing that a physician, etc., shall not disclose information received as such, etc.,—is remedial, and should be liberally construed for the protection of the confidence of patients.

The word “information” includes not only what the patient said, but as well what attendants said, and what was learned from observation, appearance and symptoms.

It is not error to refuse a general offer of the testimony of several physicians even though the testimony of one of them would have been competent.

The patient's assignee of a cause of action is entitled to invoke the privilege against testimony of the physician, even after the patient's death.

The statutory privilege is not abrogated by the adoption of the provisions of law allowing parties to be examined at the instance of their adversaries.

Appeal from judgment for plaintiff ordered at General Term, on exceptions taken at the trial where the judge directed a verdict for plaintiff and ordered the exceptions to be heard in the first instance at General Term (C. C. P., § 1000).

The action was brought upon several insurance policies issued by defendants to one Diefendorf, and by him assigned to the plaintiff.

These questions appeared in each application: “How long “since you were attended by a physician? For what diseases? “Give name and residence of such physician; name and residence of your usual medical attendant.” The answer on the first and second application was: “Dr. Carpenter has known me two years;” that given on the last application was: “Have none; only consulted Dr. C. H. Carpenter now and then for slight ailments, and taken his prescriptions. C. H. Carpenter, Geneva, has known me three years.” Dr. Carpenter was sworn as a witness by the defendant's counsel, who then made the following offer:

To prove by the physicians who were called upon to attend and prescribe for Diefendorf during the years 1863, 1864, 1865,

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1866, 1867 and 1868 (being the same above sworn), that during all of those years he was afflicted, to a very serious degree, with certain chronic diseases, and that these diseases increased upon him to his death; that the knowledge which they obtained upon the subject was obtained solely from their attendance upon him as physicians, and not from any information received from him.

The plaintiff's counsel objected to the offer on the ground that the same was privileged from disclosure under the statute. The court sustained the objection and the defendant's counsel duly excepted.

The defendant then rested its case, and the judge directed a verdict in favor of the plaintiff.

The *Supreme Court* at *General Term*, in ordering judgment for the plaintiff, were of the opinion that the reference to Dr. Carpenter, as his usual medical attendant, by the insured in his application for insurance did not waive the privilege; that (*first*) the reference to the physician is explained by saying it was given to enable defendants to verify the assured's statement by inquiries out of court, rather than by an examination of him as a witness; and (*second*) inasmuch as the privilege would ordinarily arise after the assured's death, and cannot in the usual course of things be claimed by him, the assured cannot waive the privilege. The privilege is that of the "party," but the meaning of this is that the physician will not be allowed to break the seal of confidence, of his own volition, but must have the consent of the patient; and where the patient dies before giving such consent, the consent must be given by the living litigant, who is the "party" referred to by the statute. It would be unreasonable to suppose that it was the legislative intention that the protection afforded by the statute should wholly cease with the patient's death.

That the word "information," as used in the statute, comprehends the knowledge which the physicians acquired in any way while attending the patient, whether by their own insight, or by verbal statements from him, or from members of his household, or from nurses or strangers given in aid of the physician in the performance of his duty.

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That the statutory privilege was not abrogated by § 390 of the code, enabling a party to examine the adversary as a witness; that the statutes are not inconsistent, and can be both enforced.

The Court of Appeals reversed the judgment.

MILLER, J. [*after passing on other rulings*]: The testimony of the physicians, offered upon the trial we also think was properly rejected for the reason that the information asked for was obtained by the several physicians while attending the insured as a patient, in a professional character, and was therefore privileged within the provision of a statute of this state (2 R. S., 406, §73). The statute is very explicit in forbidding a physician from disclosing any information received by him which is necessary to enable him to prescribe for a patient under his charge. It is a just and useful enactment, introduced to give protection to those who were in charge of physicians from the secrets disclosed to enable them properly to prescribe for diseases of the patient. To open the door to the disclosure of secrets revealed on the sick bed, or when consulting a physician, would destroy confidence between the physician and the patient, and it is easy to see, might tend very much to prevent the advantages and benefits which flow from this confidential relationship. The point made that there was no evidence that the information asked for was essential to enable the physician to prescribe is not well taken, as it must be assumed from the relationship existing, that the information would not have been imparted except for the purpose of aiding the physician in prescribing for the patient. Aside, however, from this, the statute in question, being remedial, should receive a liberal interpretation and not be restricted by any technical rule. When it speaks of information it means not only communications received from the lips of the patient, but such knowledge as may be acquired from the patient himself, from the statement of others who may surround him at the time, or from observation of his appearance and symptoms. Even if the patient could not speak, or his mental powers were so affected that he could not accurately state the nature of his disease, the astute medical observer would readily comprehend his condition. Information thus acquired is clearly within the

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scope and meaning of the statute. None of the cases cited by the appellant's counsel are in conflict with the interpretation given. In *Kendall v. Gray* (2 Hilt., 300), the judge, in his remarks as to the general rule of evidence on the subject, gives full force to the statute, and applies it to physicians while attending patients professionally. The evidence there offered also was not from the physician, and the communication does not appear to have been made the basis of a prescription, and it was held to be competent. In *Hewit v. Prince* (21 Wend., 79), it was held that a physician who had been consulted by the defendant as to the means of procuring an abortion was not privileged from testifying. This is not a case in point, and the decision was placed upon the ground that it was doubtful whether the communication to the physician could be considered as made while consulting him professionally, and that the information given was not essential to enable him to prescribe for the patient. Neither of these cases sustain the doctrine contended for by the appellant's counsel.

It is also urged that as to Dr. Carpenter there was a covenant that he was competent and empowered to give information as to the state of health of the insured, and as to other matters, and it was competent for the insured to waive the privilege, and he did so waive it as to Carpenter. He was the medical referee for the purpose of answering inquiries as to the condition of health of the insured, with a view of enabling the defendant to determine the accuracy of his statements in the applications. The offer of evidence made in connection with the testimony of Dr. Carpenter was general in its character, embracing all the physicians who had attended and prescribed for the insured, and not being restricted to proof from him as a medical examiner, the question does not arise whether it would have been competent if made in that qualified form.

There is no ground for claiming that the right of objecting to the disclosure of a privileged communication is strictly personal to the party making it, or to his personal representatives, and that it cannot be available to a third party. No valid reason is shown why an assignee does not stand in the same position in this respect as the original party, and the decease of the latter

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cannot affect the right of the former to assert this privilege. The authorities cited to uphold a contrary doctrine do not go to the extent claimed, with single exception, perhaps, of *Allen v. The Public Administrator* (1 Brad., 221), where the question presented was decided as apparently arising during the progress of the hearing. It is subsequently reported at page 378 of the same volume, where the will was admitted to probate, and although the case was heard in the Court of Appeals, it does not appear that the point first decided was considered or determined. How far a distinction may be held to exist where the question arises upon the probate of a will and a case where an assignee has acquired a right, it is not necessary to determine at this time, but the general rule is well settled that the protection which the law gives to communications made in professional confidence does not cease upon the death of the party. The seal which the law fixes upon such communications remains unless removed by the party himself or by his legal representative (1 Greenl. Ev., §243).

It is also urged that section 390 of the Code, by virtue of which, a party to an action may examine the adverse party as a witness in the same manner as other witnesses may be examined, abrogates the privilege; and as it would have been competent, if the applicant had been living, to have examined him as a witness, no privilege can be interposed by reason of his death. Some cases are cited to sustain this position which have reference to the relationship between attorneys and their clients while both are alive, and the effect of the section cited upon the same. It is not necessary to determine whether these decisions can be upheld as these cases present somewhat of a different question. But even if there be any valid ground for holding that while the parties are alive the Code sweeps away the common law rule established in the interest of justice and on grounds of public policy, that communications made confidentially between an attorney and his client are privileged and should be protected, it by no means necessarily follows that the positive enactment of a statute which established the same rule which previously had no existence in reference to the relationship existing between the physician and his patient is to be regarded as nugatory.

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The section of the code and the statute referred to are in entire harmony, and, as a repeal by implication is not to be encouraged, each of them can be enforced without any inconsistency. It is not to be assumed that the legislature intended to repeal a law which was enacted to prevent the disclosure of information acquired by medical men in a professional capacity and to remove what was previously regarded as a reproach upon the administration of justice without some clear and emphatic indication to that effect (*People v. Street*, 3 Park. Cr., 673; 3 R. S. [2d ed.], 737). This is wanting, and we think that the statute remains in full force and has not been affected by the provision of the code cited.

[*The opinion then discussed the question of a fraudulent suppression of the truth in deceased's answers upon his application, and, for a refusal to submit this point to the jury, judgment was reversed.*]

All the judges concurred (Church, J., in result) except Folger and Rapallo, JJ., not sitting.

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EDINGTON v. *ÆTNA LIFE INS. CO.**New York Court of Appeals, 1879.*

[Reported in 77 N. Y., 564.]

Where insured had died of nervous apoplexy within three years after the policy of insurance was issued upon his warranty that he was then and had been for seven years previous, in good health and of sound body, it is error to exclude, as immaterial, expert testimony that death by such disease, is the result of some diseases of long standing, and not of any sudden cause; such evidence is material, as bearing upon the warranty.

It is not sufficient to authorize the exclusion of evidence under 2 R. S., p. 406, § 73 (C. C. P., § 834, substantially,)—that the physician acquired the information while attending the patient—but it must be the “necessary” information mentioned in the statute.

Before exclusion of evidence is authorized under this statute, the facts must in some way appear which justify such exclusion, and the burden is upon the party objecting to show those facts.

Plaintiff sued on an insurance policy. The answer alleged that the policy had been obtained upon false warranties as to the insured’s condition.

The facts material to the ruling on the question of privilege fully appear in the opinion.

At Circuit a judgment was entered for plaintiff.

The Supreme Court at General Term affirmed the judgment, and [*passing on these points*] held, that the testimony regarding the causes producing nervous apoplexy was properly excluded, as immaterial.

That Dr. Eastman’s testimony was properly excluded, since the statute prevents not only a direct disclosure, but also the giving of any answer tending to throw light upon the subject of the prohibition. If the question, “was he cured when he left your hands,” were answered, it would open the door to an inquiry as to the maladies for which deceased was treated, and as to his condition while under witness’ treatment. The question calling for witness’ opinion of deceased’s condition was objectionable, since that opinion must necessarily be based, in part at least, on

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the information acquired by him in his professional attendance on deceased; nor was the objection obviated by the next question, which excluded any knowledge or information he had obtained while treating deceased, since it was impossible for the witness to exclude such information from his mind in forming an opinion.

The Court of Appeals reversed the judgment.

EARL, J. [*after reviewing some of the facts*]: Dr. Picot was the physician who attended Diefendorf in his last illness in 1871, when he died; and he certified and testified that his death was caused by nervous apoplexy. He was then asked this question: "State what causes will produce that?" This was objected to on the part of the plaintiffs as immaterial, and the objection was sustained. Subsequently, Dr. Swart, a physician of many years practice, was called by the defendant and testified that he was very familiar with the disease called nervous apoplexy, and that he knew what the authorities say about it. He was then asked this question: "State to the jury what it (the disease) is?" The plaintiffs objected to this, and the objection was sustained. Defendant's counsel then offered to show by the witness "that death by nervous apoplexy is the result of some disease or diseases of long standing, and not from any sudden cause." This evidence was also objected to and excluded. The evidence excluded by these rulings should have been admitted. It was not immaterial. Less than three years before his death the assured had warranted that he was then in good health and of sound body, and that he usually enjoyed good health, and that he had not during seven years previous thereto had any severe disease. As bearing upon these warranties, the defendant had the right to show the nature of the disease of which the assured died, and that it was of long standing.

Dr. Eastman was called as a witness for the defendant, and testified that his acquaintance with the assured commenced in the winter of 1862, and continued to the time of his death; that he saw him almost daily during that winter; and that he treated him professionally during the following spring and summer, prescribing for him frequently, and then ceased to attend him

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professionally or to be consulted by him. After that, to the time of his death, he continued to see him frequently, as he met him in the street and other places. He testified that he did not appear like a well man; that he was sick, weak, had the appearance of debility; that his step was slow and languid, and his voice was low and feeble; that he appeared like a feeble man, a man out of health; that at times he appeared better, and at other times worse, and that on the whole his progress was downward, to the time of his death; and that from time to time he discovered eruptions and pimples upon his face, which he described. He was asked this question: "Was he cured when he left your hands?" This was objected to by the plaintiffs and excluded. The following questions were also put, objected to and excluded: "In the month of May, 1867, in your opinion was Wilbur F. Diefendorf a man in good health and of sound body, and one who usually enjoyed good health?" "Excluding any knowledge or information that you obtained while treating Diefendorf, and judging from his appearance from that time until 1867, what is your opinion as to whether he was a man in good health, of sound body, and a man who usually enjoyed good health?" It cannot be doubted that these questions were very material, and that they were such as could properly be put to a physician. But they were excluded under the statute (2 R. S., 406, § 73) which provides, that "no person duly authorized to practice physic or surgery, shall be allowed to disclose any information which he may have acquired in attending any patient, in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon."

The rule excluding such evidence depends entirely upon this statute. It did not exist at common law (1 Philips on Ev., 164; *Duchess of Kingston's Case*, 20 How. St. Tr., 613). It should not, therefore, be made broader by construction than the language of the statute plainly requires; and in applying the statute, the purpose of its enactment should be kept in view; and that was tersely expressed by the revisers, in a note to the section, as follows: "The ground on which communications to counsel are privileged, is the supposed necessity of a full knowledge of the

facts, to advise correctly, and to prepare for the proper defense or prosecution of a suit. But surely the necessity of consulting a medical adviser, when life itself may be in jeopardy, is still stronger. And unless such consultations are privileged, men will be incidently punished by being obliged to suffer the consequences of injuries without relief from the medical art, and without conviction of any offence. Besides, in such cases, during the struggle between legal duty on the one hand, and professional honor on the other, the latter, aided by a strong sense of the injustice and inhumanity of the rule, will, in most cases, furnish a temptation to the perversion or concealment of truth, too strong for human resistance."

Before information can be excluded under this statute, it must appear that it was such as the physician acquired in some way while professionally attending a patient; and it must also be such as was necessary to enable him to prescribe as a physician, or to do some act as a surgeon. It is not sufficient to authorize the exclusion that the physician acquired the information while attending his patient; but it must be the necessary information mentioned. If the physician has acquired any information which was not necessary to enable him to prescribe, or to act as a surgeon, such information he can be compelled to disclose, although he acquired it while attending the patient; and before the exclusion is authorized, the facts must in some way appear upon which such exclusion can be justified.

Now as to the first of the three questions above stated, it is necessarily inferable from the evidence that the witness attended the assured for some disease. But it does not appear that he discovered that disease or learned its nature while attending him professionally. He saw him frequently before he attended him, and saw him after he ceased to attend him; and the court could not say that he could not answer without disclosing the necessary information which he had obtained while in professional attendance upon him. So far as appears in the evidence, he was competent to tell whether he was cured of any disease with which he had been affected.

As to the second of the questions, the same observations are appropriate. How could the court know, without a particle of

evidence, that it could not be answered without violating the statute? The witness, during several years when not in attendance upon the assured professionally, had seen him daily or weekly, and was well acquainted with his physical appearance; and the trial court could not say, and we cannot say that he could not answer the question from information thus acquired. But even if in answering the question he would have to use or disclose information he acquired while attending him, how can we, upon the evidence, say that such information was necessary to enable him to make his prescriptions?

There is still less reason for upholding the ruling as to the third question; because that in terms excluded all knowledge or information obtained while the witness was engaged in professionally treating the assured.

It is not incumbent on the party who seeks information from a physician who has been in attendance upon a patient, to show that the information was not acquired as specified in the statute; but the party objecting must in some way make it appear, if it does not otherwise appear that the information is within the statutory exclusion.

It will not do to extend the rule of exclusion so far as to embarrass the administration of justice. It is not even all information which comes within the letter of the statute which is to be excluded. The exclusion is aimed at confidential communications of a patient to his physician, and also such information as a physician may acquire of secret ailments by an examination of the person of his patient. The policy of the statute is to enable a patient, without danger of exposure, to disclose to his physician all information necessary for his treatment. Its purpose is to invite confidence and to prevent a breach thereof. Suppose a patient has a fever or a fractured leg or skull or is a raving maniac, and these ailments are obvious to all about him, may not the physician who is called to attend him testify to these matters? In doing so, there would be no breach of confidence, and the policy of the statute would not be invaded. These and other cases which might be supposed, while perhaps within the letter of the statute, would not be within the reason thereof. *Cessante ratione legis, cessat et ipsa lex.* Therefore before information

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sought to be obtained from physicians as witnesses can be excluded, the court must know somewhat of the circumstances under which it was acquired, and must be able to see that it is within both the language and the policy of the law.

[A ruling on a motion to nonsuit is here omitted.]

CHURCH, Ch. J., RAPALLO and MILLER, JJ., concurred in the result on the ground that rulings on questions of evidence referred to in opinion were erroneous; the other judges took no part.

Judgment reversed.

 Grattan v. Metropol. Life Ins. Co., 92 N. Y., 274.

GRATTAN v. METROPOLITAN LIFE INS. CO.

New York Court of Appeals, 1883.

[Reported in 92 N. Y., 274].

What a physician sees by looking upon his patient is as much within the privilege of professional information as what he learns by hearing. The privilege is not waived for the purposes of a second trial by the mere fact that the patient's counsel interrogated the physician on the point when on the stand as a witness on a previous trial, especially where, for aught that appears, a claim of privilege may have been asserted on the former trial and overruled.*

Appeal from a judgment for plaintiff in an action on a life policy.

The only facts material to the ruling on the question of privilege appear in the opinion.

FINCH, J. [*after passing upon other subjects*]: The question asked Dr. Mareness, viz.: "What opinion did you form, based on the general sight of the man, before you made an examination, or before you had any conversation with him?" was properly excluded as privileged within the statute. The doctor had never seen him before, nor seen him since. His whole knowledge came from the one interview, which was wholly and purely of a professional character. We have distinctly held in such a case that the communication to the physician's sense of sight is within the statute, and as much so as if it had been oral and reached his ear (*Grattan v. Met. Life Ins. Co.*, 80 N. Y., 297; 36 Am. Rep., 617), and that information derived from observation of the patient's appearance and symptoms must not be disclosed. (*Edington v. Mut. Life Ins. Co.*, 67 N. Y., 185). The case here is not like *Edington v. Ætna Life Ins. Co.* (77 N. Y., 564). There the physician had seen the patient, both before and after he attended him professionally. He had a possible knowledge derived from

* Compare, *McKinney v. Grand St., etc., R. Co.*, 104 N. Y., 352 (1887), holding that where the physician was called by the patient on the first trial and testified fully in her behalf as to all the facts bearing upon the patient's physical condition, the patient thus expressly waived the privilege. Such waiver is final and for all time; that the information is such, that once divulged in legal proceedings it cannot be again hidden, and being open to the consideration of the public, the privilege of forbidding its repetition is not conferred by the statute.

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observation when no professional relation existed. Here such relation began upon the instant that Terence came into his presence and continued until he disappeared from view. No information so acquired could be disclosed.

Dr. Halves was examined as a witness by the defendant, and testified that he was called as a witness on a former trial, but did not say by whom; and that he attended Terence in his last illness. He was then asked if Terence died of consumption, which was excluded. The question was then put whether upon such former trial he was not asked by the plaintiff's counsel if he attended Terence in his last illness, to which he answered in the affirmative, and that Terence died of consumption. This and some similar evidence offered was excluded. The appellant claims that this ruling is erroneous, upon the ground that the silence imposed upon the physician is a personal privilege which may be waived, and that the questions put on behalf of the plaintiff on the former trial amounted to such a waiver.

But the evidence was inadmissible for two reasons. What the witness testified to on a former trial, he being living and present for examination on the second trial, could only be proved for the purpose of contradicting him or of refreshing his memory. No emergency of that kind existed to justify the proof. To establish a waiver of the right to prevent disclosure, the only proof necessary or competent in any event was the fact of the inquiry by the plaintiff. The answer given was not needed for such purpose. It was the question which opened the door.

But we do not agree that the plaintiff's inquiry on the former trial precluded his objection on the latter one. It was an incident in the mode of the trial. It waived, for that occasion and under then existing circumstances, an objection which might have been relied upon. It was in no sense an admission of the party, but proof by a witness. The party was not even then bound by the fact but might disprove it. *Owen v. Cawley* (36 N. Y., 600), cited as authority, was a peculiar case. An order had been entered by the General Term entitling either party on the new trial to read the evidence which had been given on the other. And it was the admission of the party that was sought to be proved, and in that connection it was said that where as absolute

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an unqualified admission is made in a pending cause, whether by written stipulation of the attorney, or as a matter of proof on the hearing, it cannot be retracted on a subsequent trial unless by leave of the court. The case is far from establishing that because proof which might have been, was not excluded on a first trial, it cannot be shut out on the second. Such a rule would tend to perpetuate and make incurable the errors or indiscretions or oversights of counsel, and hamper the second trial with a study of the first. We do not know how the plaintiff came to ask the questions. The case does not show who called the witness. The plaintiff may have asserted her privilege and been overruled by the court, and so driven to these inquiries without any voluntary waiver of her rights. We are of opinion that the evidence objected to was properly excluded.

Renihan v. Dennin, 103 N. Y., 573.

RENIHAN v. DENNIN.

New York Court of Appeals, 1886.

[Reported in 103 N. Y., 573.]

To bring a case within N. Y. Code Civ. Pro., § 834—forbidding a physician or surgeon “to disclose any information which he acquired in attending a patient in a professional capacity which was necessary to enable him to act in that capacity”—it is enough to show that the witness attended as a physician or surgeon on behalf of the patient, and obtained his information in that capacity, even though he was summoned by a friend or a stranger, and without any actual employment by the patient. *So held* where he was called in by the attending physician.*

It seems, that to bring a case within N. Y. Code Civ. Pro., § 835—as to communications made between client and attorney, etc.—it must be shown that the contract relation of attorney and client existed.

The statute applies to testamentary causes, such as the probate of a will, as well as other causes. The ruling in *People v. Pierson* (79 N. Y., 424) rested on the fact that that was a criminal case, and not merely on death having rendered waiver impossible.

The rule in *Edington v. Aetna L. Ins. Co.* (77 N. Y., 564), *Grattan v. Metropolitan L. Ins. Co.* (80 N. Y., 281)—that the statute excludes information acquired by seeing a patient, even though no communications pass between him and the physician—reiterated.

On proceedings for probate of a will, a physician, called as a witness for the contestants, testified that he was requested by the attending physician to visit the testator in consultation, and saw him shortly before his death, and advised a prescription. *Held*, proper to refuse to allow the witness to describe the appearance and condition of the sick man, and to give an opinion as to his dying condition or his condition respecting testamentary capacity.

Appeal from judgment allowing probate of will.

The surrogate of Rensselaer county admitted to probate the will of James Dennin, deceased. Upon appeal to the General Term the surrogate's decree was reversed, and special issues as to the competency of the testator and the due execution of the will were ordered to be tried before a jury.

At the trial it appeared that the will was executed in the evening, a short time before the testator's death, and that during

* Otherwise where the jail authorities or prosecuting attorney sent a physician merely to examine a prisoner. *People v. Kemmler* 119 N. Y., 580.

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that evening, and before the execution, Dr. Bontecou was requested by the attending physician to be present at the testator's house for consultation with him relative to the testator's condition and treatment; and, in pursuance of such request, he did attend.

He was now called as a witness for the contestants, and testified that he saw the testator, and advised a prescription for him. The following questions were put to the witness: "Will you describe the appearance and condition of the sick man when you got into the room?" "At the time you examined this man, was he, in your judgment, in that state known to your profession as 'collapse?'" "Was he, in your judgment, in a dying condition?" "State whether, in your judgment, at any time after that occasion when you were there, James Dennin was in such a condition that he was capable of understanding and taking into account the nature and character of his property, and of his relations by blood and marriage, to those who were or might become the objects of his bounty, and make an intelligent disposition of his property by will." The last question was repeated, confining it to the time when the witness saw the testator.

The court excluded these questions. The will was admitted to probate, and the contestants appealed.

EARL, J. [*after stating above facts*]: All the questions were objected to on behalf of the proponent as incompetent under sections 834 and 836 of the Code, and the objections were sustained, and counsel for the contestants excepted, and the sole question for our determination upon this appeal is whether that exception was well taken.

Section 834 is as follows: "A person duly authorized to practice physic or surgery shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, which was necessary to enable him to act in that capacity;" and section 836 provides that that section applies to every examination of a person as a witness, unless the provisions thereof are expressly waived by the patient.

Dr. Bontecou was a person duly authorized to practice physic. Whatever information he had about the condition of the testator he acquired while attending him as a patient. It is true that

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the testator did not call him, or procure his attendance; but he did not thrust himself into his presence or intrude there. He was called by the attending physician, and went in his professional capacity to see the patient, and that was enough to bring the case within the statute. It is quite common for physicians to be summoned by the friends of the patient, or even by strangers about him; and the statute would be robbed of much of its virtue if a physician thus called were to be excluded from its provisions, because, as contended by the learned counsel for the appellant, he was not employed by the patient, nor a contract relation created between him and the patient. To bring the case within the statute it is sufficient that the person attended as a physician upon the patient, and obtained his information in that capacity.

Section 835 provides that "an attorney or counsellor at law shall not be allowed to disclose a communication made by his client to him, or his advice given thereon, in the course of his professional employment." Before that section can apply in any case a contract relation of attorney and client must exist, based upon an employment by the client, and the decisions holding this, to which our attention has been called, have no bearing upon section 834.

It is not disputed, and could not well be, that the information obtained by the witness was necessary to enable him to act in his professional capacity. Therefore, if the letter of the statute is to prevail, it cannot be doubted that the rulings of the trial judge were correct.

But it is claimed that the statute should be held not to apply to testamentary cases. There is just as much reason for applying it to such cases as to any other, and the broad and sweeping language of the two sections cannot be so limited as to exclude such cases from their operation. There is no more reason for allowing the secret ailments of a patient to be brought to light in a contest over his will than there is for exposing them in any other case where they become the legitimate subject of inquiry. An exception so important, if proper, should be engrafted upon the statute by the legislature, and not by the courts.

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It is also claimed that the statute should be so construed as only to prohibit the disclosures by a physician of any information of a confidential nature obtained by him from his patient while attending him in a professional capacity. Such was the view of the statute taken by me in my opinion in *Edington v. Aetna Life Ins. Co.* (77 N. Y., 564); but my brethren were then unwilling to concur with me in that view. When the same question again came before the court in *Grattan v. Metropolitan Life Ins. Co.* (80 N. Y., 281), I again attempted to enforce the same view upon my brethren, and again failed, and it was then distinctly held that the statute could not be confined to information of a confidential nature, and that the court was bound to follow and give effect to the plain language without interpolating the broad exception contended for.

It is further contended that the rule laid down in *People v. Pierson* (79 N. Y., 424), should be applied to this case. We there held that the statute did not cover a case where its prohibition was invoked solely for the protection of a criminal, and not at all for the benefit or protection of the patient who was dead, and a waiver of the prohibition had, therefore, become impossible. We are unable to perceive how the reasoning upon which that decision rests can have any application to this case. Here there is no allegation of crime, and there is a mere contest over the patient's property.

It is probably true that the statute, as we feel obliged to construe it, will work considerable mischief. In testamentary cases where the contest relates to the competency of the testator, it will exclude evidence of physicians which is generally the most important and decisive. In actions upon policies of life insurance where the inquiry relates to the health and physical condition of the insured, it will exclude the most reliable and vital evidence which is absolutely needed for the ends of justice. But the remedy is with the legislature, and not with the courts.

The judgment should be affirmed with costs.

All concur.

Judgment affirmed.

Pierson v. People, 79 N. Y., 424.

PIERSON v. PEOPLE.

New York Court of Appeals, 1880.

[Reported in 79 N. Y., 424.]

The statute (N. Y. Code Civ. Pro., § 834) providing that a physician or surgeon shall not be allowed to disclose information acquired by him as such, etc.—cannot be invoked in a criminal case where desired not at all for the benefit of the patient, but solely for the protection of the accused after the patient is dead, so that express waiver is impossible.*

Writ of error to reverse judgment of the Supreme Court affirming a conviction of William Pierson by the Oyer and Terminer, on an indictment for murder of Seaman B. Withey.

The facts material to the question of evidence appear in the opinion.

EARL, J. [*after passing on other questions*]: While Withey was sick, suffering from the poison which is supposed to have been administered to him, Dr. Coe, a practicing physician was called to see him by the prisoner, and he examined him and prescribed for him. On the trial, he was called as a witness for the People, and this question was put to him: "State the condition in which you found him at that time, both from your own observation and from what he told you?" The prisoner's counsel objected to this question on the ground that the information which the witness obtained was obtained as a physician, and that he had no right to disclose it; that the evidence offered was prohibited by the statute. The court overruled the objection, and the witness answered, stating the symptoms and condition of Withey as he found them from an examination then openly made in the presence of Withey's wife and the prisoner, and as he also learned them from Withey, his wife and the prisoner. There was nothing of a confidential nature in anything he learned or that was disclosed to him. The symptoms and condition were such as might be expected to be present in a case of arsenical poisoning. It is now claimed that the court erred in allowing this evidence, and the statute (§ 834 of the Code) is invoked to uphold the

* Distinguished in *People v. Murphy*, 101 N. Y., 126; s. c., p. 125 of this vol. Re-affirmed in *People v. Harris*, 136 N. Y., 423, 448.

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claim. That section is as follows: "A person duly authorized to practice physic or surgery shall not be allowed to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity." This provision of the Code is a substantial re-enactment of a provision contained in the Revised Statutes. (2 R. S., 406). Such evidence was not prohibited at common law. The design of the provision was to place the information of the physician, obtained from his patient in a professional way, substantially on the same footing with the information obtained by an attorney, professionally, of his client's affair. The purpose was to enable a patient to make such disclosures to his physician as to his ailments, under the seal of confidence, as would enable the physician intelligently to prescribe for him; to invite confidence between physician and patient and to prevent a breach thereof. (*Edington v. Mutual Life Ins. Co.*, 67 N. Y., 185; 77 *id.*, 564.)

There has been considerable difficulty in construing this statute, and yet it has not been under consideration in many reported cases. It was more fully considered in the *Edington* case than in any other or all others. It may be so literally construed as to work great mischief, and yet its scope may be so limited by the courts as to subserve the beneficial ends designed, without blocking the way of justice. It could not have been designed to shut out such evidence as was here received, and thus to protect the murderer rather than to shield the memory of his victim. If the construction of the statute contended for by the prisoner's counsel must prevail, it will be extremely difficult, if not impossible, in most cases of murder by poisoning, to convict the murderer. Undoubtedly such evidence has been generally received in this class of cases, and it has not been understood among lawyers and judges to be within the prohibition of the statute.

How then must this statute be construed? The office of construction is to get a meaning out of the language used, if possible. If the words used are clear and unmistakable in their meaning, and their force cannot be limited by a consideration of the whole scope of the statute or the manifest purpose of the Legislature, they must have full effect. But in endeavoring to understand the meaning of words used, much aid is received from

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a consideration of the mischief to be remedied or object to be gained by the statute. By such consideration, words otherwise far reaching in their scope may be limited. Statutes are always to be so construed, if they can be, that they may have reasonable effect, agreeably to the intent of the Legislature; and it is always to be presumed that the Legislature has intended the most reasonable and beneficial construction of its acts. Such construction of a statute should be adopted as appears most reasonable and best suited to accomplish the objects of the statute; and where any particular construction would lead to an absurd consequence, it will be presumed that some exception or qualification was intended by the Legislature to avoid such consequence. A construction which will be necessarily productive of practical inconvenience to the community is to be rejected, unless the language of the law-giver is so plain as not to admit of a different construction. (Potter's Dwarries on Statutes, 202).

The plain purpose of this statute, as in substance before stated, was to enable a patient to make known his condition to his physician without the danger of any disclosure by him which would annoy the feelings, damage the character, or impair the standing of the patient while living, or disgrace his memory when dead. It could have no other purpose. But we do not think it expedient, at this time, to endeavor to lay down any general rule applicable to all cases, limiting the apparent scope of this statute. We are quite satisfied with the reasoning upon it of Judge Talcott, in his able opinion delivered at the General Term of the Supreme Court, and we agree with him "that the purpose for which the aid of this statute is invoked in this case is so utterly foreign to the purposes and objects of the act, and so diametrically opposed to any intention which the Legislature can be supposed to have had in the enactment; so contrary to and inconsistent with its spirit, which most clearly intended to protect the patient and not to shield one who is charged with his murder, that in such a case the statute is not to be so construed as to be used as a weapon of defense to the party so charged, instead of a protection to his victim." This objection was therefore not well taken.

[*A ruling on another subject is here omitted.*]

Judgment affirmed.

People v. Murphy, 101 N. Y., 126.

PEOPLE v. MURPHY.

New York Court of Appeals, 1885.

[Reported in 101 N. Y., 126.]

The statute (N. Y. Code Civ. Pro., § 834)—providing that a physician or surgeon shall not be allowed to disclose information acquired by him as such, etc.—applies to criminal cases.

The rule in *Pierson v. People* (79 N.Y., 424; s. c., p. 122 of this vol.)—that the privilege cannot, after the patient's death, be invoked solely to shield a third person under prosecution—does not apply where the patient is living, and the disclosure tends to convict her of a crime or disgrace her.

The mere fact that the physician was selected and sent by the public prosecutor, does not necessarily prevent the privilege if the patient, while at liberty to decline his services, accepted them as services in his professional character.

Even where the witness is competent, his testimony to the patient's narrative of past events (the patient not being a party) is not competent, for a narrative of a past event is not part of the *res gestae*.

The opinion of an expert is not competent if founded in part upon the history of the case as he got it from the patient, but not disclosed in the testimony as distinguished from his observation and complaints of present suffering.

Appeal from conviction for causing an abortion.

The facts appear in the opinion.

FINCH, J. We are of opinion that section 834 of the Code of Civil Procedure is applicable to criminal actions, and whatever possible doubt may have attended the question is fairly dispelled by section 392 of the Code of Criminal Procedure. The confidential character of disclosures by a patient to his attending physician was established, before the Code, by statute, and in terms which, beyond reasonable question, applied to all actions, whether civil or criminal. (3 R. S., 6th ed. 671, §119; *People v. Stout*, 3 Park Cr., 670.) That statute was substantially incorporated into the Civil Code, in language broad enough to justify the same general application as that which characterized the older statute; and the further provision of the Code of Criminal Procedure, already referred to, seems to us intended to settle the question. No doubt upon that subject was intimated

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in *Pierson v. People* (79 N. Y., 424); but in that decision the statute was construed, and we held it did not cover a case where it was invoked solely for the protection of a criminal, and not at all for the benefit of the patient, and where the latter was dead so that an express waiver of the privilege had become impossible. The present is a different case. Here the patient was living, and the disclosure which tended to convict the prisoner inevitably tended to convict her of a crime, or cast discredit and disgrace upon her.

We have no doubt upon the evidence that between her and the witness, whose disclosure was resisted, there was established the relation of physician and patient. Although he was selected by the public prosecutor and sent by him, yet she accepted his services in his professional character, and he rendered them in the same character. She was at liberty to refuse and might have declined his assistance, but when she accepted it, she had a right to deem him her physician and treat him accordingly. It follows that the exception to his disclosure of what he learned while thus in professional attendance was well taken.

But if his evidence had been admissible as being competent, another error was committed. He was sent to the patient after the crime was complete, when the abortion had been accomplished, and the patient was merely suffering the physical consequences of the act. Although she herself was a party to that crime, and relatively to it was an accomplice of the accused, and, so to speak, a co-conspirator with him, yet her declarations, narrative of a past occurrence and constituting no part of the *res gestae*, were not admissible. These declarations were excluded by the court upon the objection of the accused, and properly excluded. But, notwithstanding, the attending physician was allowed to express his opinion as a medical expert that an abortion had been produced, founding that opinion not only upon what he observed of the physical condition of the woman, but upon all her statements, and upon the history of the case as derived from her.

The opinion of the General Term concedes the error of such evidence, but insists that the opinion was founded upon her statements merely of "the locality of the pain, the condition of

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the injured parts, and so on." We understand what occurred differently. When the witness was first asked his opinion whether the birth occurred from natural or artificial causes, he inquired whether in giving his answer he would be allowed to consider the clinical history of the case as he got it from the girl's statement, to which the prosecutor replied: "Certainly; I ask the question on the whole history of the case as you learned it from her, as well as from the examination." To this the prisoner objected. The court did not at once pass on the objection, but suggested that the physician answer first from his observation alone. He did so answer and said: "From my physical examination of the woman and the foetus it would lead me to believe that an abortion had been induced," and then added, as a reason, that natural miscarriages were not likely to occur at that stage of pregnancy with the frequency of earlier stages. How weak this evidence was upon the vital point, whether the miscarriage arose from natural or artificial causes, was made apparent on the cross-examination, where, in answer to the distinct question, "whether or not from such physical examination as you describe you made there, is it possible, as a matter of medical knowledge, science and experience, to say that a miscarriage had been produced," the witness felt constrained to answer "No, sir." The prosecutor, apparently feeling the need of adding some decisive force to the opinion, followed his first inquiry with this question: "On the personal examination that you made of the woman and the foetus, and the history of the case as you got it from her, what do you say now as to whether or not there had been an abortion brought about by artificial means?" To this question the prisoner's counsel objected as calling for hearsay and a privileged communication, and on the further ground that it involved "the history of the case" which had not been disclosed. The district attorney offered to disclose it, and put the question, what the girl said, which was objected to and excluded. Thereupon the court overruled the objection, and the witness answered, "I say an abortion had been produced." It is not possible on this state of facts to say justly that by the history of the case and the girl's statement was meant only her complaints of present pain and suffering.

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Nothing of the kind was suggested, or pretended, or could have been understood by court or witness or jury. Indeed, on cross-examination, the witness describes what he meant by the "clinical history of the case," saying, "I wrote down part of her statement and testified to it in the police court; and that included how she came there and what happened since she came to that house." So that the opinion of the expert that a crime had been committed, founded upon the narrative of the woman of previous facts, which narrative was, itself, inadmissible and remained undisclosed, was given to the jury. Necessarily it carried with it damaging inferences of what that narrative in fact was, and drove the accused to the alternative of omitting all cross-examination as to the concealed basis of the opinion, or admitting inadmissible evidence.

We think there was error for which the judgment should be reversed, and a new trial granted, and the proceedings remitted to the Court of Sessions of Monroe County, for that purpose.

All the Judges concurred.

Judgment reversed.

NOTE ON PRIVILEGED INFORMATION ACQUIRED
BY PHYSICIAN RESPECTING PATIENT.

For recent cases on the Relation ; the Information ; Who may claim the privilege ; the Manner of Objecting ; and Waiver of the privilege, see the following :

The Relation :

Indiana : Aetna Ins. Co. *v.* Deming, 1890, 24 Northeast. Rep., 86 ; *id.*, 375 (a physician's partner is not competent to testify as to what he learns of a patient's condition while the latter is in the firm's office for treatment by the witness' partner). *New York* : People *v.* Schuyler, 106 N. Y., 298 ; s. c. 12 Northeast. Rep., 783 (a jail physician, who has merely examined and observed a prisoner, but who has never prescribed for him, may testify from such examinations and observation as to his sanity) ; Matter of Freeman, 46 Hun, 458 (physician called by attorney of testatrix to examine her mental condition, but without her knowledge, and who at testatrix's request subscribes her will, is a competent witness upon the probate of the will) ; Renihan *v.* Denin, 103 N. Y., 573 ; s. c. 18 Abb. N. C., 101 ; 9 Northeast. Rep., 320 (the rule applies where the physician called as witness had attended the patient upon the request of another physician, and not that of the patient himself) ; but compare Henry *v.* N. Y., Lake Erie, etc. R. R., Co., 10 N. Y. Supp., 508 ; s. c. 57 Hun, 76 ; 32 State Rep., 16 (holding that a surgeon who was not expected to treat or advise, but merely requested by an attending physician to examine plaintiff, was not disqualified from testifying against him) ; Heath *v.* Broadway, etc. R. R. Co., 57 N. Y. Super. Ct., 496 (in an action for personal injuries a physician, who called upon plaintiff in defendant's behalf, may testify) ; People *v.* Kemmler, 119 N. Y., 580 ; s. c. 24 Northeast. Rep., 9 (a physician who is sent to examine the mental condition of a prisoner charged with a murder, may testify for the prosecution) ; s. p. People *v.* Sliney, 137 N. Y., 570 ; s. c. 33 Northeast. Rep., 150 ; Grossman *v.* Supreme Lodge, etc., 6 N. Y. Supp., 821 (a physician who made the rounds with an attending hospital

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physician out of curiosity and assisted him in the examination of deceased and partly attended her, but did not have charge of her, cannot testify as to decedent's condition); *Matter of Loewenstine*, 2 Misc. R., 323; s. c. 21 N. Y. Supp., 931 (a physician, who, merely as a visitor, assists the superintendent of an asylum, may testify as to an inmate's condition, which would have been apparent to any person having medical skill); *Fisher v. Fisher*, 129 N. Y., 654; s. c. 29 Northeast. Rep., 951 (a physician may be asked in answering a question as to the mental condition of a person, whom he has attended professionally, to exclude from his mind any knowledge or information which he acquired while acting as a medical attendant and to confine his answer to such knowledge and information as he obtained when the person in question was not his patient); *S. P. Brigham v. Gott*, 3 N. Y. Supp., 518; and *Matter of Loewenstine*, 2 Misc. R., 323; s. c. 21 N. Y. Supp., 931; but compare *Matter of Darragh*, 5 *id.*, 58; s. c. 52 Hun, 591 (holding that a physician who attended a testator professionally and also visited her socially, could not give his opinion of testator's capacity formed from impressions received on friendly visits, as such impressions necessarily related to knowledge acquired professionally); *Wiel v. Cowles*, 45 Hun, 307, (communications with one acting as a physician, but not licensed as such, are not privileged).

Information:

California: *Freel v. Market St. Ry. Co.*, 1893, 31 Pacific Rep., 730 (a physician cannot testify as to knowledge acquired in prescribing for a patient). *Indiana*: *Heuston v. Simpson*, 1888, 17 Northeast. Rep., 261 (a physician cannot testify as to the mental condition of his patient, whether his knowledge was derived from the latter's words, his own observation or examination); *Pennsylvania Co. v. Marion*, 1890, 23 *id.*, 973 (a physician who dresses wounds in an accident cannot testify as to the victim's statements as to its cause). *Michigan*: *Cooley v. Foltz*, 1891, 48 Northwest. Rep., 176 (in an action for an assault, defendant may call as a witness the physician who attended plaintiff to prove the mere fact of such attendance; and the physician may also testify that when called in the plaintiff told

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him that she was suing and would want him as a witness); Breisenmeister v. Supreme Lodge, K. of P., 1890, 45 Northwest. Rep., 977 (a physician may testify as to the number and dates of his visits). *Missouri*: Kling v. City of Kansas, 27 Mo. App., 231 (in an action for personal injuries a physician who treated plaintiff cannot testify as to whether he has been drinking). *New York*: Feeney v. Long Island R. Co., 116 N. Y., 375; s. c. 22 Northeast. Rep., 402 (a physician called in by one suffering from an accident cannot testify as to conversations with patient concerning the injury, or information derived from the examination); s. p. Jones v. Brooklyn, etc. R. Co., 3 N. Y. Supp., 253; Brown v. Rome, etc. R. Co., 45 Hun, 439 (in an action for personal injuries it is error to exclude the testimony of plaintiff's physician that plaintiff stated to him that he heard a person hallooing to him and saw a man swing his hat, but that he did not know where he was until the train was almost upon him); Hoyt v. Hoyt, 112 N. Y., 493; s. c. 20 Northeast. Rep., 402 (a physician may testify as to a conversation with a deceased testator as to the sanity of testator's child); Matter of O'Neil, 7 N. Y. Supp., 197 (a physician may testify as to his patient's declarations, as to his will and his advice on that subject); Harrington v. Winn, 14 N. Y. Supp., 612 (the physician of a deceased testator may testify as to his condition, where he states that though his information was acquired while attending deceased, it was not such as was necessary to enable him to act professionally); s. p. Matter of Halsey, 9 *id.*, 441; Patten v. United Life, etc. Ins. Assn., 133 N. Y., 450; s. c. 31 Northeast. Rep., 342 (a physician may testify that his patient was sick and the number of times he attended him, in order to show that the patient was not in good health at a certain period); Numrich v. Supreme Lodge, etc., 3 N. Y. Supp., 552 (a physician may prove the mere fact of his attendance upon patient); Pandjiris v. McQueen, 13 *id.*, 705, (a physician may testify that one attended his deceased patient as nurse); Van Orman v. Van Orman, 11 *id.*, 931 (a physician cannot testify as to the mental capacity of his deceased patient); Kelly v. Levy, 8 *id.*, 849 (in supplementary proceedings against a physician he cannot be compelled to deliver up an account book containing information received while attending patients);

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People *v.* Brower, 53 Hun, 217; s. c. 6 N. Y. Supp., 730 (defendant in an indictment for aiding a miscarriage upon summoning a physician to the woman's aid, stated in reply to the physician's inquiry what the matter was. Held, that such communication was privileged); Matter of Hoyt, 20 Abb. N. C., 162 (a physician's affidavit as to his patient's mental condition cannot be used upon an application to appoint a committee for him as an habitual drunkard). *Texas*: Steagald *v.* State, 1887, 3 Southwest. Rep., 771 (in absence of statute, communications by patient to physician are not privileged).

Who May Claim the privilege:

People *v.* Harris, 136 N. Y., 493; s. c. 33 Northeast. Rep., 65, (upon a trial for murder defendant cannot object to the testimony of deceased's physician, since the privilege is not conferred to shield the murderer of the patient).

The Manner of Objecting:

Michigan: Breisenmeister *v.* Supreme Lodge, K. of P., 1890; 45 Northwest. Rep., 977 (after a physician's testimony has been received without objection, it cannot be stricken out upon motion as a matter of right). *New York*: Hoyt *v.* Hoyt, 112 N. Y., 493; s. c. 20 Northeast. Rep., 402 (upon a contested probate after proponent has called and examined testator's physician without objection, and contestant has cross-examined him, his testimony will not be stricken out on contestant's motion); Record *v.* Village of Saratoga Springs, 46 Hun, 448 (in absence of anything to show the contrary, one acting as a physician will be presumed to have had the necessary license in determining upon appeal whether his testimony had been properly admitted); Stowell *v.* American Co-operative Relief Assn., 5 N. Y. Supp., 233, (one who seeks to exclude a physician's testimony must show the facts to bring the testimony within the statute; and where the physician testifies that he was not acting professionally and there is nothing to show the contrary, his testimony may be admitted); Patten *v.* United Life, etc. Ins. Assn., 133 N. Y., 450; s. c. 31 Northeast. Rep., 342 (an objection that a physician's testimony is incompetent and irrelevant is not sufficient to raise the objec-

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tion that it relates to a privileged communication within Code Civ. Pro., § 834).

Waiver of the privilege:

California: Valensin v. Valensin, 1887, 14 Pacific Rep., 397, (where the client waives the privilege the physician may be compelled to testify). *Indiana:* Lane v. Boscourt, 1891, 27 Northeast. Rep., 1111 (in an action against a physician for malpractice the introduction by plaintiff of testimony by himself, his wife and her mother as to all that was done by defendant at the time of the operation constitutes a waiver of any objection to defendant's testimony as to what he did do); Morris v. Morris, 119 Ind., 341; s. c. 21 Northeast. Rep., 918 (testator's legal representatives seeking to maintain his will may waive the objection as to the testimony of testator's physician); Williams v. Johnson, 1887 (the calling of a physician merely to testify that he attended plaintiff does not waive the privilege). *Iowa:* McConnell v. City of Osage, 1890, 45 Northwest. Rep., 550 (the fact that plaintiff testified as to her general good health during several years, and that a certain physician attended, does not constitute a waiver to the testimony of such physician). *Michigan:* Brown v. Metropolitan Life Ins. Co., 1887, 32 Northwest. Rep., 610 (in an action on a life policy where deceased had stated in her application that she had been treated for typhoid fever by a physician, the physician may testify as to whether he had so treated her); Breisenmeister v. Supreme Lodge, K. of P., 1890, 45 Northwest. Rep., 977 (statements in the proof of death under a life policy by deceased's physician are a waiver of the privilege so far as they relate to matters that are privileged; and a party who has waived the privilege on one trial cannot claim it on a new trial). *Missouri:* Davenport v. City of Hannible, 1892, 18 Southwest. Rep., 1122 (the patient may waive the privilege); s. p. Carrington v. City of St. Louis, 89 Mo., 208; s. c. 1 Southwest. Rep., 240; Blair v. Chicago, etc. Ry. Co., 89 Mo., 334; s. c. 1 Southwest. Rep., 367 (in an action for personal injuries to plaintiff's wife, the wife's physician may testify if both husband and wife waive the privilege); Thompson v. Ish, 1889; 12 Southwest. Rep., 510 (upon a contested probate a defendant devisee may waive

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the privilege as to the testimony of deceased's physician); *Mellor v. Missouri Pac. Ry. Co.*, 1891, 14 Southwest. Rep., 758, (where one has two physicians he does not, by calling one to testify concerning his injury, thereby waive the incompetency of the other to testify against him); *Adreveno v. Mutual etc. Life Assn.*, 34 Fed. Rep., 870, (under Mo. R. S., § 4017, a waiver by deceased in a life insurance application is binding on the beneficiary). *Nevada*: *State v. Depoistor*, 25 Pacific Rep., 200 (on an indictment for rape of a child of seven, *held*, that the parents of the prosecutrix could waive the privilege as to the testimony of the child's physician, and that such waiver might be implied from the fact that the parents instituted the prosecution and were with the child, the principal witnesses, and testified as to the nature of the complaint for which the physician prescribed). *New York*: *McKinney v. Grand Street, etc. Ry. Co.*, 104 N. Y., 352; s. c. 10 Northeast. Rep., 544 (a party, by calling her physician as a witness, waives the privilege, and upon a subsequent trial the adverse party may call the physician and examine him as to the same matters); *Marx v. Manhattan Ry. Co.*, 56 Hun., 575; s. c. 10 N. Y. Supp., 159 (where the plaintiff in an action for personal injuries himself testifies as to the consultation with his physician, he waives the privilege; but compare *Butler v. Manhattan Ry. Co.*, 30 Abb. N. C., 78, holding that plaintiff by bringing an action for a miscarriage and putting her physical condition on trial did not waive the privilege); *Treanor v. Manhattan Ry. Co.*, 28 Abb. N. C., 47; s. c. 14 N. Y. Supp., 270 (where the plaintiff in an action for personal injuries testifies without reservation as to his injuries and their effect, his physician may testify as to what he has learned of his condition); *Record v. Village of Saratoga Springs*, 46 Hun., 448 (the fact that one of the parties to an action introduces evidence concerning a consultation between her physician, another physician and the witness, does not waive the privilege as to communications between herself and physician); *Alberti v. New York, Lake Erie, etc. R. Co.*, 118 N. Y., 77 (the privilege may be waived by the patient's attorney calling the physician as a witness and stating that he waives the privilege); *Buffalo, etc. Safe Deposit Co. v. Knights Templars, etc. Assn.* 126 N. Y., 450; s. c. 27 Northeast. Rep.,

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942 (in a suit upon an insurance certificate, a certificate as to the cause of deceased's death, given by the physician who attended him, and which was furnished the company by the claimant, is admissible in evidence); *Jones v. Brooklyn, etc. R. Co.*, 3 N. Y. Supp., 253 (the privilege is not waived by the patient's bringing an action for an injury to his leg and by offering testimony to show that it was broken; nor by the fact that a physician who, acted for defendant, testified as to the amputation of the leg).

I. *Competency.* (14) Pastor and Parishioner.

NOTE ON INCOMPETENCY OF CLERGYMAN TO
DISCLOSE COMMUNICATION OF PARISHIONER.

This privilege did not exist at common law.

Under the N. Y. Statute (Code Civ. Pro., § 833), a clergyman is not privileged from disclosing communications which were made to him, not in his professional character, nor in the course of discipline of his denomination. Thus, a conversation between the pastor and the treasurer of a religious corporation as to business of the church, upon affairs in respect of which the latter was charged with fraud, is not privileged. (Supreme Ct., 1835, *People v. Gates*, 13 Wend., 311, under 2 R. S., 406, § 72, of which C. C. P., § 833 is substantially a re-enactment.)

NOTE ON THE AMERICAN STATUTES PROTECTING
ESTATES AGAINST INTERESTED WITNESSES.

The general policy of the American Statutes is to limit the admission of the testimony of a party or interested witness, as against the estate of a deceased person or the interest of one succeeding to his right. The ground of the rule is, that, although parties and interested witnesses are now generally competent, some exception should be made where the adversary in the controversy is deceased. The law prefers to admit all parties, but where death silences one, the law will silence the other as to matters peculiarly within their sole knowledge. The statutes for this purpose are very diverse. Some reach the result by forbidding parties and interested witnesses from testifying to transactions with or statements by the deceased in all actions where the opposite party is an executor or administrator (see Act of Congress, p. 139, below). Others by similar prohibition where the action is on a contract, etc. with one since deceased. Others attempt to define the line with more discrimination.

Where the statute is a mere proviso or saving clause in the act abolishing the common law disqualification of interest, it has been held that it does not make incompetent such testimony as would be competent at common law (*Sheetz v. Norris*, 2 Weekly Notes (Pa.), 637. And the common law exception, from necessity, in case of contents of baggage, etc., was admitted in *Sykes v. Bates*, 26 Iowa, 521, s. p.; *Nash v. Gibson*, 16 *id.*, 305). But where the statute is a new, independent and affirmative provision, it does exclude the kind of testimony described by it, although such as would have been previously competent (*Mattoon v. Young*, 45 N. Y., 696).

Whatever be the frame of the statute, its object and the general guide in its construction is to apply the exclusion in such manner as to put both parties on an equality; but the court will not do violence to the plain language of the statute for the purpose of securing this effect (*Abbott's Trial Evidence*, p. 61).

THE NEW YORK STATUTE.

[This act, by a long series of amendments, has been now settled in the following form, which covers systematically nearly, if not quite, all the points of importance which have arisen in the application of the principle.]

N. Y. Code Civ. Pro., § 829: "Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title, by assignment or otherwise, shall not be examined as a witness, in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the

 Note on the Statutes.

executor, administrator or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic, except where the executor, administrator, survivor, committee, or person so deriving title or interest is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence, concerning the same transaction or communication. A person shall not be deemed interested for the purposes of this section by reason of being a stockholder or officer of any banking corporation which is a party to the action or proceeding, or interested in the event thereof."

ANALYSIS OF THE NEW YORK STATUTE.

The following analysis of the elements of the rule, as embodied in the New York Statute, will indicate the arrangement of the following cases, and will afford ready means of intelligently comparing other cases in this and other jurisdictions upon the same points :

- | | |
|--|--|
| (a.) Upon what Proceedings Applicable. | Upon the trial of an action, or the hearing upon the merits of a special proceeding, |
| (b.) Who Disqualified. | a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title, by assignment or otherwise, |
| (c.) As Witness for Whom.* | shall not be examined as a witness, in his own behalf or interest, or in behalf of the party succeeding to his title or interest, |
| (d.) Against Whom. | against the executor, administrator or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, |
| (e.) Concerning What. | concerning a personal transaction or communication between the witness and the deceased person or lunatic, |
| (f.) Exception. | except where the executor, administrator, survivor, committee, or person so deriving title or interest is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence, concerning the same transaction or communication. |

* No cases on this point separately are inserted ; see those under (a.) and (b.)

THE ACT OF CONGRESS.

U. S. R. S., § 858: "In the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried: "*Provided*, That in actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects, the laws of the State in which the court is held shall be the rules of decision as to the competency of witnesses in the Courts of the United States in trials at common law, and in equity and admiralty."

NOTE ON WHAT PROCEEDINGS ARE AFFECTED
BY THE STATUTE AS TO INTEREST TESTI-
MONY AGAINST ESTATES OF
DECEDENTS, ETC.

The trial by a jury of special questions of fact directed by an order under C. C. P., 823, is the "trial of an action" within the provision of the statute. *Parks v. Andrews*, 56 Hun, 391.

A contested proceeding before the surrogate for probate is within the statute. (Devisee incompetent.)—*Matter of Eysaman*, 118 N. Y., 62 (reported below under "e"). (Heirs at law and next of kin incompetent.)—*Schoonmaker v. Wolford*, 20 Hun, 166. (Legatees incompetent.)—*Snyder v. Sherman*, 23 Hun, 139.

Also, a contested proceeding in the same court for letters of administration. *Estate of Molter*, 22 Weekly Dig., 507.

Also, a proceeding by an executor or administrator to discover property withheld under L. 1870, c. 394 (substantially incorporated in C. C. P., §§ 2707-10). *Tilton v. Ormsby*, 10 Hun, 7.

Davis v. Gallagher, 55 Hun, 593.

DAVIS v. GALLAGHER.

New York Supreme Court, 1890.

[Reported in 55 Hun, 593.]

The fact that a witness is a party to the record does not alone disqualify him under N. Y. Code Civ. Pro., § 829, where his testimony is against and not in support of his own interest.

Plaintiff sued defendants, as legal representatives of a deceased person, to recover for supplies and for services rendered by himself and his wife.

On the trial, Mrs. Price, who was a defendant, and who was also plaintiff's mother and the decedent's widow was called as a witness by the defendant to testify to the conversations between herself and the defendant's intestate.

Objection to such evidence, as prohibited by N. Y. Code Civ. Pro., § 829, was overruled, and exception taken.

Upon the report of the *Referee*, judgment was entered for plaintiff.

The Supreme Court at General Term affirmed the judgment.

MARTIN, J. [*after passing on other subjects*]: We do not think the exception to this evidence well taken. This ruling is, we think, sustained by the doctrine of the case of *Carpenter v. Soule*, (88 N. Y., 251). Although Mrs. Price was a nominal party to the action, still she was not called to testify in her own behalf or interest. Her testimony was against her interest. "The fact that the witness is a party on the record is no longer controlling." (*Whitehead v. Smith*, 81 N. Y., 152.*)

* In *Whitehead v. Smith*, 81 N. Y., 151, an action where husband and wife executed a mortgage on the wife's land to secure their joint bond, and she then conveyed the land to her son, who alone defended the foreclosure action, setting up the defense of usury, the mortgagee died before trial, which took place in 1878, while Code Civ. Pro., § 830—disqualifying husband or wife of a person incompetent under § 829—was in force.—*Held*, That the husband could not be called as a witness for the son to prove usury, as the wife, from whom the son took title, could not have testified to the fact.

The opinion also states the conclusion above quoted in the text.

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It is also claimed that the provisions of section 829 were violated by permitting the plaintiff to testify to the arrangement made by him with the decedent about certain logs. The appellant made the plaintiff his witness and proved by him that he had had logs of the decedent, and that he used a horse belonging to the decedent in drawing them to the mill. After this evidence was given, in explanation thereof, and for the purpose of giving the whole transaction relating to the subject, the plaintiff was asked to state under what arrangement with Mr. Price he drew such logs. This evidence was admitted under the defendant's objection and exception. The defendant proved by the plaintiff that he had had logs of the decedent for the purpose of charging him with their value. A transaction between the plaintiff and the decedent was thus shown by the defendant's examination. When this was done, the whole transaction was open, and the plaintiff was entitled to testify in his own behalf in relation thereto. Section 829 was not intended to abrogate the rule of evidence that where a party calls a witness and examines him as to a particular part of a transaction or communication, the other party may call out the whole of the transaction or communication bearing upon or tending to qualify the particular part to which the examination of the other was directed. (Merritt v. Campbell, 79 N. Y., 625; Nay v. Curley, 113 *id.*, 575.) We think this evidence was admissible and properly received by the referee.

[*Other rulings are here omitted.*]

Judgment affirmed.

GOURLAY v. HAMILTON.

New York Supreme Court, 1886.

[Reported in 41 Hun, 437.]

Interest, in the sense conveyed by N. Y. Code Civ. Pro., § 829, means a direct legal interest in the judgment at the time the witness is sworn. When a person causes title to land to be taken in the name of another to prevent his wife from having any interest therein, there being no writing to show an interest remaining in himself, that other has the legal title, and the former has no legal interest within the meaning of the law.

A defendant in a foreclosure suit who was made a party as a tenant of part of the mortgaged premises, but left their occupation before the trial, is not disqualified from testifying to personal transactions with the original mortgagee, since deceased, although it be shown that the title was taken in the name of the apparent owner to prevent the witness from acquiring any rights in the land, there being no written evidence that the witness had any interest therein, and consequently nothing which would establish an enforceable legal right.

Plaintiff, as executor of Thomas C. Gourlay, deceased, sued to foreclose a mortgage given by defendant, Eliza Hamilton, to the plaintiff's testator.

Upon the trial, one Cook, who was made a party defendant, having been a tenant of part of the mortgaged premises, was called as a witness by his co-defendant, to testify to personal transactions and communications between the witness and the plaintiff's testator.

Plaintiff objected, as a violation of N. Y. Code Civ. Pro., § 829; the objection was overruled and exception taken.

Judgment for defendant on a *trial* without a jury.

The Supreme Court at General Term affirmed the judgment.

BARNARD, P. J. [*on this point*]: The witness, Cook, although a defendant, had no interest in the event of the action, and he did not testify in favor of a co-defendant who derived a title through him. The action was brought to foreclose a mortgage given by the defendant, Hamilton, to the plaintiff's testator, and Mrs. Hamilton held the fee of the land. Cook was her tenant

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in possession of a portion of the premises, and proof was given tending to show that Cook had said that he had caused the title to be taken in the name of Mrs. Hamilton, but that it was done to escape the rights of his wife, which would have been created therein if the deed were taken to himself. The defendant, Cook, had left the occupation of the premises before the trial. Cook's interest must be made out either because he was a tenant defending his own premises or that he was the equitable owner of the property.

I do not deem either position sound. Cook had left the premises at the time he was offered as a witness, and interest, in the sense conveyed by section 829 of the Code, means a direct legal interest in the judgment at the time he is sworn. This he had not at the time of the trial. When a person takes a title to evade responsibility in any way in the name of another, that other owns the title absolutely by statute if his interest is not evidenced by writing. No such writing is proved, and the presumption is in favor of the competency without proof of that fact. As the evidence stands, if credited, Cook has taken a title in Mrs. Hamilton in the expectation, without the power of enforcement, legally or equitably, that Mrs. Hamilton will hold the title for him and give it up to him when required. Such a condition of the situation would affect Cook's credibility, but would not amount to a legal interest. The judgment in favor of or against Mrs. Hamilton, would not strengthen his right as against Mrs. Hamilton. A judgment against Mrs. Hamilton would render it impossible for her to give up the title to Cook, if she wished to do so.

CULLEN, J., concurred.

MILLER v. MONTGOMERY.

New York Court of Appeals, 1879.

[Reported in 78 N. Y., 282.]

A surety on an administration bond, since he is bound for his principal's obedience to all orders of the Surrogate touching the administration, is interested in the event of an accounting by his principal in the Surrogate's Court.

A party, by putting on the stand an interested witness without inquiring upon direct examination for any transaction or communication with the deceased, does not waive his right to object that the adverse party cannot cross-examine as to such transactions or communications.

If the interest of a witness is first discovered after testimony, rendered thereby incompetent, has been given without objection, it is within the discretionary power of the court to grant a motion to strike out such testimony.

Upon the settlement of the account of William A. Miller, as executor of David Rea, deceased, the account was contested by certain legatees and objections filed, they claiming that he had failed to charge himself with the proceeds of certain securities for the payment of money, which they alleged, were owned by the testator at the time of his death. The executor claimed that these securities were given to his wife by the testator some months before his death.

Hugh S. Pollock was called by contestants and gave evidence showing that the securities belonged to testator before his death, and were found in an unsealed envelope in his room, after his death, by the witness, who delivered them to Mrs. Miller, the executor's wife. The contestants did not examine him as to any personal transaction or communication with the testator.

On cross-examination he said: "he [the deceased] handed it (the envelope containing sureties) to me, and told me to hand it to Mrs. Miller, when she came down, as a New Year's present."

He said to me: "Pollock, will you be kind enough to take this package—handing to me the enclosed package in question—and deliver it to Mrs. Miller, my niece?"

Sometime after the cross-examination, the counsel for contestants first discovered that the witness was a surety upon the

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bond of the executor, who was a non-resident, which bond was given on taking out letters testamentary in this state. He thereupon, at a regular hearing of the case, moved that all the evidence given by Pollock upon his cross-examination relating to personal transactions and communications with testator, be stricken out, on the ground that the witness was interested and incompetent under section 399 of the Code of Procedure (equivalent in this respect to § 829 of the Code of Civil Procedure). On showing that such interest was unknown to contestants at the time the evidence was given, the evidence was stricken out.

An auditor's report was rendered in favor of the contestants.

The Surrogate's Court confirmed the auditor's report.

The Supreme Court at General Term affirmed the surrogate's decree, on the same ground as taken by the surrogate, viz., that the surety was bound under the rule in *Wilcox v. Smith*, 36 Barb., 316.

The Court of Appeals affirmed the judgment.

EARL, J. [*after stating the facts*]: That the witness was incompetent to give the evidence stricken out cannot be doubted. The executor, being a non-resident, was required, before letters could be issued to him, to give such a bond as is required of administrators in cases of intestacy (2 R. S., 70), and the bond required of administrators is conditioned that the administrator "shall faithfully execute the trust reposed in him as such, and also that he shall obey all orders of such surrogate touching the administration of the estate committed to him." (2 R. S., 78.) It has never been doubted that the surety on such a bond is bound by the decree of the surrogate made upon a regular accounting, and that such decree would be evidence against him in a suit upon the bond. (*Wilcox v. Smith*, 26 Barb., 316, 346.) A surety, therefore, upon such a bond is so far interested that he would, in such a case, be an incompetent witness under the rule of the common law. That rule is laid down in 1 Greenleaf

on Evidence, section 390, as follows: "The true test of the interest of a witness is that he will either gain or lose by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action." By section 398 of the old Code this common law rule, except as provided in the next section, was abrogated by the provision that no witness should be excluded by reason of his interest in the event of the action or proceeding. And then in section 399 it is, among other things, provided that no person interested in the event of an action or proceeding shall be examined as a witness against a legatee in regard to any personal transaction or communication between such witness and the deceased person under whom the legatee claims. Pollock was, therefore, interested in the event of the accounting, and was not a competent witness to testify to the matters stricken out, unless the legatees in this case waived their right to object to or complain of the evidence.

They waived nothing by calling him as a witness. He was not an incompetent witness. Either party had the right to call him and have him sworn; and either party had the right to examine him as to all matters to which he was competent to testify; and by such examination they waived nothing. By examining him as to matters for which he was competent, a party would not be bound to permit him to testify as to matters for which he was incompetent. By producing him as a witness, a party would not certify that he was competent to testify as to all matters pertinent to the issue on trial. A party may put his lawyer or physician on the stand as a witness to testify to certain facts, and yet the adverse party could not upon cross-examination question the witness as to professional communications or disclosures excluded by the general rules of law.

But a party may waive his objections to the incompetent evidence in several ways. He may do it by himself, inquiring as to the forbidden transactions or conversations. If he does this, the opposite party may inquire as to the same matters. But here, Pollock, upon his examination on behalf of the contestants, was asked only as to facts to which he was perfectly competent to testify. He was not asked as to any transaction or conversation

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with the testator. A party may also waive the objection to the incompetent evidence by omitting to make any objection. If he does not object, the evidence is received, and must be weighed for what it is worth.

Usually the objection must be made when the incompetent evidence is offered ; and this is the rule as to all incompetent evidence. But if the objection be not made at the time, and the omission be shown to have been from mistake or inadvertence, the trial court may permit it to be made at any time before the close of the trial, by motion to strike out the incompetent evidence. This is not uncommon practice in the trial of cases. When the objection is not made at the time the evidence is offered or given, it is in the discretion of the trial judge to permit it to be made at a later stage of the trial. That discretion should be carefully exercised, so that no harm will come to the other party ; and it should be exercised when it is just that the incompetent evidence should be excluded, and no harm can come to the opposite party from the delay in making the objection. It is like many other matters of discretion in the conduct of the trial, with the fair exercise of which a court of review will not interfere.

Here, this evidence should not have been given. It is such as the policy of the law excludes as not sufficiently reliable for the fair administration of justice. There is no suggestion that there was any harm to the executor by the delay in making the objection, and it is clear that there was no harm. The executor lost nothing by the delay, and was in no way embarrassed thereby ; and there is no reason to suppose that the delay was from bad faith. If the evidence had not been stricken out, the executor would, from the mere ignorance and mistake of the counsel opposed, have received the benefit of evidence to which he was not entitled under the law.

The fact that this evidence was called out upon cross-examination does not help the executor. It was not a cross-examination as to any matter inquired of by the other party. It was an examination to establish his defense by new facts against the claim of the legatees. As to such examination, he was in the same attitude, so far as pertains to the competency of the wit-

ness to testify to such new facts, as if he had himself produced the witness.

With this evidence stricken out, it is not claimed that the alleged gift was established; and, therefore, without determining whether or not all the evidence, if left in the case, would have shown a valid gift, the judgment must be affirmed, with costs.

All the judges concurred.

Judgment affirmed.

NOTE.—In *Church v. Howard*, 79 N. Y., 415, an action upon a promissory note, Fargo, the maker of the note for whom defendant Howard signed as surety, was a party defendant, but did not answer. Upon the trial Fargo was called as a witness for the defense, and was permitted to testify, against the objection of the plaintiff, to personal transactions which took place between the witness and plaintiff's intestate; the trial judge holding that the Code did not apply to a party who had not interposed answer and was not interested in the event.—*Held*, error.—MILLER, J. [*referring to Code Civ. Pro.*, § 829, *said*]: The question whether the witness was not a party within this provision and hence incompetent, is not free from difficulty; but however that may be, we think that he was “a person interested in the event,” and therefore incompetent to testify as to any personal transaction between himself and the intestate, and his testimony was improperly received. He was interested in avoiding a judgment against the defendant Howard, the surety, which would entitle such surety to prosecute and obtain a judgment against the defendant Fargo, which he might be compelled to pay. He would be affected by the legal operation and effect of the judgment, and the record would be legal evidence in an action by the surety to recover the amount paid for his principal (1 Greenl. on Ev., § 390). The case of *Hobart v. Hobart* (62 N. Y., 80), cited by the defendant's counsel, is not in point in reference to the question last discussed. And the view we have taken upon the question last considered is sustained by the recent case of *Miller v. Montgomery* (78 N. Y., 282).

Wallace v. Straus, 113 N. Y., 238.

WALLACE v. STRAUS.

New York Court of Appeals, 1889.

[Reported in 113 N. Y., 238.]

In an action against a guarantor, the principal debtor who has not, by formal notice to defend or its equivalent, been put in a position to be bound by the judgment, is not interested, and is not disqualified from testifying in behalf of the defendant to personal transactions with the plaintiff's decedent.

Action upon a guaranty.

Ferdinand Straus being indebted to F. B. Wallace, for the amount of which indebtedness Wallace held, as collateral security, 200 shares of railroad stock on which the margin was inadequate, and which he was about to sell to satisfy the debt, one Moses Straus agreed to guarantee Wallace from any loss that might be sustained by reason of holding and carrying said stock. Wallace having died, his executrix, after notice to Moses Straus and Ferdinand Straus, sold the stock at a loss and brought this suit against Moses Straus for the balance.

On the trial, the defendant called his brother, Ferdinand Straus, as a witness, and he was asked: "Did you give any instructions to Wallace in November, 1881, with reference to a sale of these two blocks of stock?"

Objected to by the plaintiff's counsel on the ground that the witness being the principal debtor, and the action being against his surety, he was interested in its event and, therefore, incompetent to testify to a personal transaction with the plaintiff's testator under N. Y. Code Civ. Pro., § 829.

The Court permitted the witness to answer "yes or no" and he answered "yes." This question was followed by one calling for the instructions given, and the objection being renewed, the court sustained it and excluded the testimony.

Judgment was entered for plaintiff upon decision of the court without a jury.

The Supreme Court at General Term affirmed the judgment.

The Court of Appeals reversed the judgment.

ANDREWS, J. [*after stating the facts*]: It must be assumed, in the absence of any objection on that ground, that the testimony offered was material. It is certainly possible that instructions might have been given by Ferdinand Straus to Wallace, the disregard of which would furnish a defense, in whole or in part, to the action.

The question, therefore, is whether the witness was interested in the event of the action, as upon this ground only could the question have been excluded under section 829. The test of the interest which disqualifies a witness, not a party, under this section, is stated by Church, Ch. J., in *Hobart v. Hobart* (62 N. Y., 80), in construing a corresponding section of the prior code, adopting substantially the language in 1 Greenleaf on Evidence (§ 390). He says: "The true test of the interest of a witness, is that he will either gain or lose by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action. It must be a present, certain and vested interest, and not an interest remote, uncertain or contingent." The same rule was reiterated in *Nearpass v. Gilman* (104 N. Y., 507). The witness, Ferdinand Straus, was not interested within the rule. He was not bound by the judgment rendered against the surety. It is plain that the judgment would not determine his liability in an action subsequently brought by Wallace against him to recover the debt or in any way limit it, except that if collected it might operate as payment in full or *pro tanto* of the debt. So, if the surety, having paid the judgment, should bring an action for reimbursement, the recovery against the surety would not fix the liability of the principal. The judgment against the surety would not be an adjudication as against Ferdinand Straus, that the surety had incurred any liability for which he was entitled to indemnity. It would be admissible to prove the fact of the judgment, and it would determine the amount of the liability over of the primary debtor to the surety when his liability had been otherwise established. This conclusion results from the "most obvious principle of justice, that no man ought to be bound by proceedings to which he was a stranger." (1 Greenl. Ev., 522.)

Wallace v. Straus, 113 N. Y., 238.

Ferdinand Straus, was, within this principle, a stranger to the suit against the surety. He was not a party, nor, so far as it appears, was any notice given to him by the surety to defend the action, nor had he undertaken the defense. It may be assumed, from the fact that he was called as a witness, that he knew of the pendency of the suit. But before he could be bound by the judgment he must have been placed by the act of the surety in a situation calling upon him to assume the control of the action or to aid in its defense, as though a party, with the right to adduce testimony and to cross-examine witnesses, and to appeal from the judgment. (1 Greenl. Ev., § 523.) The bare fact that he was called as a witness by the surety, nothing else appearing, did not bind him by the result of the litigation. It will be found in the cases upon the subject that something more was necessary. There must be formal notice to defend, or something tantamount to such notice, given by the surety, or the principal must have assumed the defense of the action, or aided in preparing the defense in order to bind him by the result. (*Barney v. Dewey*, 13 Johns., 224; *Brewster v. Countryman*, 12 Wend., 446; *Chicago v. Robbins*, 2 Black, 418; *Lovejoy v. Murray*, 3 Wall., 1.) In short, no fact determined against the surety in the action, or which might have been determined therein, would, under the circumstances disclosed, when the ruling in question was made, be available to, or would bind the witness in any subsequent action brought against him either by the surety or the creditor Wallace.

We think, therefore, the evidence offered was erroneously excluded, and that for this error the judgment should be reversed and a new trial granted.

All the judges concurred.

Judgment reversed.

Morgan v. Johnson, 87 Ga., 382.

MORGAN v. JOHNSON.

Supreme Court of Georgia, 1891.

[Reported in 87 Ga., 382.]

In an action brought by the beneficiaries of a trust fund against surviving partners, the trustee is *prima facie* incompetent to testify for the plaintiffs concerning a transaction or communication between himself and a member of the partnership, now deceased, under the Georgia Act of 1889, which declares that "where a person not a party, but a person interested in the result of the suit, is offered as a witness, he shall not be competent to testify, if, as a party to the cause he would for any cause be incompetent."

The *facts appear sufficiently in the opinion.*

The *Superior Court* granted a nonsuit.

The *Supreme Court* affirmed the judgment.

BLECKLEY, C. J. 1. The suit was by the children of Morgan against the surviving partners of the firm of Harrold, Johnson & Co. and others. It involved the tracing of a trust fund which Morgan had held as trustee for the plaintiffs, and which he had wasted. A portion of this fund had been invested by him in certain realty which was paid for in part with his own money, and in part with the trust money. He took the title to this property in his own name, with no declaration or disclosure of any trust upon the face of the conveyance. He afterwards sold and conveyed it as his own to Harrold, Johnson & Co., and they paid him for it. The plaintiffs sought by this action to assert their rights as beneficiaries of the trust, and to charge Harrold, Johnson & Co. with their equitable interest in the realty, thus acquired by the firm from their trustee. To affect the firm with notice of the trust they offered at the trial to prove by their father, the trustee, conversations which he had had with Thomas Harrold (a member of the firm since deceased), in which he informed him, Harrold, that some of the trust money was invested in this land. These conversations were prior to and at the time of the execution of his deed to the firm. There was no suggestion that any other member of the firm was present at or privy to the conversations, or any of them. The court ruled the witness

incompetent to give the evidence offered, because Thomas Harrold was dead.

The witness act of 1889, in clause (b) declares that "where any suit is instituted or defended by partners, persons jointly liable, or interested, the opposite party shall not be admitted to testify in his own favor as to transactions or communications solely with an insane or deceased partner, or person jointly liable or interested, and not also with a survivor thereof." Under this provision, if one or all of the plaintiffs had been present at the alleged conversations with Harrold, and had heard notice of the trust communicated to him, they would have been incompetent to so testify at the trial, Harrold being then dead. Thus the plaintiffs themselves were not competent witnesses to prove what they sought to prove by their trustee. In clause (d) the act declares that "where a person not a party, but a person interested in the result of the suit, is offered as a witness, he shall not be competent to testify if, as a party to the cause, he would for any cause be incompetent." The trustee was not a party to this suit. If he had been a party, that is, if he had brought the suit as trustee to recover the trust fund, or trust property, which he had parted with to Harrold, Johnson & Co., he would have been incompetent to testify in the cause in his own favor as to his conversations with Harrold, for the reason that Harrold is dead. Thus he certainly has two of the three marks of an incompetent witness which are specified in clause (d), the clause last above quoted. Has he the third and most important mark,—was he interested in the result of the suit?

"The predicaments in which a witness may be incompetent in respect of the result admit of three varieties: 1st. Where actual gain or loss would result simply and immediately from the verdict and judgment. 2dly. Where the witness is so situated that a legal right or liability would immediately result from the verdict and judgment. 3dly. Where the witness would be liable over to the party calling him in respect to some breach of contract or duty on the part of the witness involved in the issue." 1 Stark Ev., 7 Am. ed. from 3d London ed. (1842), pp. 106, 107. "It seems that in general where a witness is *prima facie* liable to the plaintiff in respect of the cause for which he sues, he is not a compe-

tent witness for the plaintiff to prove the defendant's liability. For his evidence tends to produce payment or satisfaction to the plaintiff at another's expense; and the proceeding and recovering against another would afford strong if not conclusive evidence against the plaintiff in an action against the witness." 1 Stark. Ev., *supra*, 112.

There can be no doubt that a trustee who has wasted the fund is liable to answer for it to the beneficiary of the trust; and it is manifest that if the beneficiary follows the fund and recovers it from a third person to whom the trustee has parted with it, the liability of the trustee to his *cestui que* trust is thereby discharged. The trustee is consequently as much interested in aiding the beneficiary in maintaining a suit to recover the fund from a third person as he would be were the suit his own. Nothing, therefore, can be more clear than that Morgan, the trustee, was interested in the result of this suit; and *prima facie* his whole interest was on the side of the plaintiffs, the party calling him to testify. What effect the warranty of title in his deed, as an individual, to Harrold, Johnson & Co., may have had in balancing his interest is not now for consideration; for that warranty so far as it appears, was not before the court or brought to its attention when the competency of the witness was under adjudication. According to the order of statement in the bill of exceptions, the deed was not put in evidence until after the decision on the competency of the witness was pronounced; and it is nowhere intimated that the witness or the rejected testimony was again offered after the deed was introduced. Ignoring the warranty as a factor in the question, we hold simply that, on the facts presented, the court did not err in ruling the witness incompetent and excluding his testimony.

[*A ruling that the non-suit was not error is here omitted.*]

Judgment affirmed.

Carpenter v. Soule, 88 N. Y., 251.

CARPENTER v. SOULE.

New York Court of Appeals, 1882.

[Reported in 88 N. Y., 251.]

In an action by a mortgagor against the mortgagee's executors, to cancel the mortgage on the ground of a gift by the testator, to the mortgagor of the amount unpaid thereon,—*Held*, that § 829 did not exclude the testimony of a specific and residuary legatee under the testator's will, but who was not a party to the action, as to declarations of the deceased tending to establish the validity of the gift; since, as specific legatee, she had no interest in the result of the action, and as residuary legatee, her testimony was against her interest, so that she was not testifying "in her own behalf and interest" within said section.

Plaintiff, Jackson S. Carpenter, a son of the testator, Azel Carpenter, had executed a mortgage to his father in the lifetime of the latter; and now brought this action against the executor to have the mortgage adjudged paid and satisfied. The cause turned on the effect of a receipt which the father before his death had (without actual payment) given the son, expressed to be for "\$2,000 to apply on a bond and mortgage I hold against him, the same to be endorsed on said mortgage."

On the trial, Anna Stevens, a daughter of Azel Carpenter, but not a party to the action although a specific and residuary legatee under her father's will, was called as a witness for the plaintiff and permitted, against defendant's objection, to testify to certain communications with her father, deceased.

The trial court held that this was a gift of that sum, the clause as to endorsement not being a condition.

The Supreme Court at General Term upheld it as a release or present discharge, which may be given by sealed release; and a receipt should have substantially the same effect. They also held the testimony properly received.

Hobart v. Hobart, 62 N. Y., 80.

LEARNED, P. J. [*on this point said*]: The testimony of Anna Stevens is competent, as she testified, not in her own interest, but against her interest. Section 399 of the old Code was different from section 829 of the new.

The Court of Appeals affirmed the judgment.

FINCH, J. [*as to the admission of Anna Stevens' testimony*]: She was not a party to the action, but was claimed to be both a specific and residuary legatee under the will of her father, and so interested in the event of the action, and testifying in her own behalf and interest. The Code, as it now stands, has modified section 399 of its predecessor, by inserting the words "in his own behalf or interest, or in behalf of the party succeeding to his title or interest." As thus amended, the witness did not fall within the prohibition. As specific legatee she was totally unaffected by the result of the pending litigation, and as residuary legatee, her plain and direct interest was against the validity of the gift, which her evidence tended to establish. She testified not in her own behalf or in her own interest, but against it, and for that reason her testimony was properly admitted.

HOBART v. HOBART.

New York Court of Appeals, 1875.

[Reported in 62 N. Y., 80.]

In an action by one heir against another to set aside a deed as being fraudulently obtained, a third heir holding like deeds, but not a party to the action, is competent to testify to personal transactions with the decedent.

Such person is interested only in the question involved and not in the event of the action.

His interest in the *question* goes only to his credibility.

Action to set aside deeds which William L. Hobart, the father of both plaintiff and defendants, had executed to the defendants, prior to his death, upon the ground that the grantor was then incompetent to convey, and also upon the ground of fraud and undue influence.

Hobart v. Hobart, 62 N. Y., 80.

Upon the trial, Lucinda Decker and Charles H. Hobart, children of the deceased who were not parties to the action, but who had received conveyances from him of property about the same time and under similar circumstances as those to the defendants which were sought to be set aside, were called on behalf of plaintiff, but were not allowed, on defendants' objection, to testify to personal transactions and communications with the deceased.

The Supreme Court at Special Term gave judgment for the defendants.

The General Term affirmed the judgment without opinion.

The Court of Appeals reversed the judgment.

CHURCH, Ch. J. [*after stating the facts*]: If these witnesses were competent to testify to conversations with the deceased, either for the purpose of showing the state of his mind, or to make his statements evidence of material facts, it was unnecessary, in the first instance, at all events, to state the particular language sought to be proved. It cannot be claimed that the court was misled, nor but that it was intended to hold that these persons were incompetent to give this evidence, and the only question is whether such holding is error. These persons were not incompetent by reason of being parties to the action, and I am unable to see how they were in a legal sense interested in the event of the action. "The true test of the interest of a witness is, that he will either gain or lose by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action. It must be a present, certain and vested interest, and not an interest uncertain, remote, or contingent." (1 Greenl. on Ev., § 390). The record could not be used for or against them. If the plaintiff succeeded, the result would not affect these persons. The deeds would still remain valid as against them and their interest, notwithstanding the prayer for judgment that they be declared void as against the heirs of the deceased. A plaintiff cannot enlarge his rights in respect to the judgment by asking for more than he is entitled to, nor can he in this way litigate the rights of others

not parties. The most that can be claimed is, that these persons were interested in the question involved, but such interest is not sufficient to disqualify (*Id.*, § 389, and cases cited). If these persons were either proper or necessary parties to the action, they could have been brought in at any time under the code, but application was not made by either party, nor was the point taken. They were competent to testify to any facts which any other witness might, and their feeling or position in reference to the subject-matter of the action could only go to their credibility.

The point, that communications or personal transactions sought to be proved for the sole purpose of showing the state of a person's mind as to sanity or competency, is not within the purview of the restrictions contained in section 399, was not urged, and it is unnecessary to pass upon it; and yet the defendant, Chester Hobart, was permitted to testify to conversations with his father upon the matters involved in the action. It is said by counsel that this evidence was given only to show the state of mind of the grantor. This does not appear either by the objection or decision, but if so, why should not the evidence of Charles Hobart and Mrs. Decker have been received for the same purpose. The counsel felt obliged to claim that the code rendered them incompetent to testify to personal communications for any purpose, and yet to sustain the ruling as to Chester Hobart, he must occupy the opposite ground. It is difficult to reconcile the two decisions as they appear in the printed case.

It is urged that these decisions would not have changed the result. This may be so, but we have no legal means of so determining. When the admission or rejection of evidence could not legitimately affect the result, the error will be disregarded, but it cannot be seen what facts might have been proven, nor can we say what influence such facts might have had upon the court who tried the case.

It is unnecessary to discuss the other questions. For the error in rejecting the evidence referred to, we feel constrained to reverse the judgment and grant a new trial; costs to abide the event.

All the judges concurred.

Judgment reversed.

Connelly v. O'Connor, 117 N. Y., 91.

CONNELLY v. O'CONNOR.

New York Court of Appeals, 1889.

[Reported in 117 N. Y., 91.]

The interest or liability of a mother in respect to the support of her illegitimate child, is not an interest in the event of an action brought by a third person against an executor or administrator to recover on a promise of the decedent to pay plaintiff for care and support of the child.

The interest, if any, is too "remote, contingent and uncertain," and is an interest in the question as distinguished from an interest in the event.

An action originally against John O'Connor, defendant's intestate, to recover for the care and support of an illegitimate child under an alleged contract with him.

Upon the death of O'Connor, his administratrix, Mina E. O'Connor, was substituted as defendant. Upon the trial before a referee, plaintiff called her sister, the mother of the child, as a witness, and the witness was asked to state the conversation between Mr. O'Connor and the plaintiff.

Defendant's counsel objected to the question upon the ground that the witness was interested in the event of the action and the question called for a personal transaction and conversation between the witness and decedent and is incompetent under N. Y. Code Civ. Pro., § 829.

Objection overruled and exception taken.

A subsequent motion to strike it out was also denied.

Judgment entered for plaintiff upon the report of the referee.

The Supreme Court at General Term affirmed the judgment.

BRADLEY, J. The mother of a bastard child has at common law the duty of its maintenance and the father can be made chargeable only by proceedings under the statute, although he may charge himself by express promise. (*Moncrief v. Ely*, 19 Wend., 405 ; *Birdsall v. Edgerton*, 25 Wend., 619.)

Assuming that the mother would have been liable to the plaintiff, if the latter had failed to recover of the defendant, she would

be deemed to have an interest in the event of the action (1 Greenl. Ev., §§ 390, 393.)

This agreement, so far as appears, was a transaction wholly between plaintiff and O'Connor, in which the witness and others took no part, and as she says she was not treated by them as doing so by acquiescence or otherwise.

In that view it seems to have been exclusively a conversation between the two and the evidence of the witness would seem to have been competent. (*Simmons v. Session*, 26 N. Y., 264 ; *Cary v. White*, 59 N. Y., 336.)

The Court of Appeals affirmed the judgment, rendering the following opinion *per curiam* : The witness Lucy Mooney was not a party or privy to the action. She was, therefore, a competent witness to prove the alleged contract between the plaintiff and the defendant's intestate, unless she was interested in the event, even assuming that her testimony involved a personal transaction between herself and the intestate. (Code, §829.)

We think she was not interested in the event of the action within that section. In construing that section it has been held that the test of interest, where the witness is not a party, is that the witness "will either gain or lose by the direct legal operation of the judgment, or that the record will be legal evidence for or against him in some other action. It must be a present, certain and vested interest, and not an interest uncertain, remote or contingent." (*Hobart v. Hobart*, 62 N. Y., 81 ; *Wallace v. Straus*, 113 *id.*, 238.)

The recovery of a judgment by the plaintiff in this action against the administratrix of O'Connor would not bar a subsequent action by the plaintiff against the witness to recover for the support of the child, nor would it establish that the expenses incurred by the plaintiff in its support were incurred under circumstances which precluded her from enforcing the common law liability of the mother of a bastard child to provide for its support and maintenance. The fact that the support was furnished by the plaintiff under a contract with the father might constitute a defense to a suit against the mother. But a judgment against the administratrix of the putative father in this action, to which

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the witness was neither a party or privy, would not be conclusive upon the plaintiff in favor of the mother in a subsequent action against her, that the plaintiff furnished the maintenance under such a contract, nor, indeed, would the record be evidence that such a contract had been made. The evidence of Lucy Mooney tends to show that the plaintiff took the child as her own, acting in respect to it *in loco parentis*, thereby precluding herself from claiming that the maintenance was furnished on account of the mother and on her credit. We think the interest of the witness in the event of the action was, if any, "remote, contingent and uncertain," and was an interest in the question as distinguished from an interest in the event.

Without, therefore, considering whether the testimony of the witness was concerning a personal transaction between herself and the defendant's intestate, we think the judgment should be affirmed on the ground that she was not a party or a person interested in the event of the action within the meaning of the Code.

All the judges concurred, except Ruger, Ch. J., and Andrews, J., not voting.

Judgment affirmed.

SANFORD v. ELLITHORP.

New York Court of Appeals, 1884.

[Reported in 95 N. Y., 48.]

A widow, who, during her husband's lifetime joined in a conveyance of land by him in order to release her dower, is interested in the event of an action brought after his death to set aside the conveyance as obtained from him by fraud and undue influence, and therefore incompetent to testify, against defendant, to a personal transaction or communication with her husband.

Plaintiffs sued to cancel deeds made by their deceased father to his sons, the defendants, on the ground of fraud and undue influence in obtaining them.

On the trial, Mrs. Cooper, who, at the time of the execution of the deeds, was the wife of the grantor and had joined in the

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conveyances, was called as a witness by plaintiff to testify as to a communication between herself and the deceased person.

The defendants objected "that the witness is not competent; that she is interested in the event of the action." And, after an answer stating conversation between her and the deceased had been given, defendants moved to strike it out on the ground "that witness seeks to show the purpose of the conveyance of the land in controversy by deceased to his sons, and that it details personal and private transactions between husband and wife."

The objection and motion were overruled and exception taken.

Upon report of the *Referee*, judgment entered for plaintiffs.

The Supreme Court at General Term affirmed the judgment without opinion.

The Court of Appeals reversed the judgment.

DANFORTH, J. [*after stating the facts*]: It cannot be doubted that her testimony was of an important character, bearing distinctly upon every issue in the case. The objection was in substance that it related to personal transactions with the deceased by an interested witness, and it was not necessary to refer to the section of the Code or other authority by which the objection could be sustained. It is enough that the objection was in fact well taken. It pointed directly to the respondent's testimony as incompetent, because it involved a personal communication between the witness—an interested person—and the deceased grantor. If the objection had simply been that the witness was not competent under the section referred to (§829), it would have been unavailing, because too general. (*Ham v. Van Orden*, 84 N. Y., 271.) But the reasons for the exclusion were in the relation of the witness to the event of the action, the character of the testimony, and the source of title in the defendants to the property in controversy. The attention of the referee and adverse counsel was called to them, and that was enough (*Simpson v. Downing*, 23 Wend., 316). The cases to which the learned counsel for the respondent has referred are not to the contrary, viz.: *Somerville v. Crook* (9 Hun, 664), *Levin v. Rus-*

Eisenlord v. Clum, 126 N. Y., 552.

sell (42 N. Y., 251), Williams v. Sargeant (46 *id.*, 481), and Quinby v. Strauss (90 *id.*, 664). In all of them the terms of objection were of the most general kind, viz.: "Objected to."

The case here is quite different, and specific grounds of objection were stated. Moreover the course of examination and the ruling of the referee were such that it must have been understood that the objection was to the competency of the witness to answer the question addressed to her under the prohibition of the section of the code above referred to.

[*Rulings on other subjects are here omitted.*]

All the judges concurred in reversal except RUGER, Ch. J., dissenting.

EISENLORD v. CLUM.

New York Court of Appeals, 1891.

[Reported in 126 N. Y., 552.]

The mother of a plaintiff in ejectment, called as a witness, to prove her marriage to his father, the person last seized, upon the validity of which marriage, plaintiff's right to inherit and therefore to recover depends, has not such an interest in the action as to render her incompetent to testify to the transaction.

She is not one from, through or under whom the son derived any interest from his father.

The term "interest in the event" of the action used in the statute does not have any larger meaning than it had in the common law rule disqualifying interested witnesses.

She has no interest in the record for the purpose of evidence, because the judgment would not be competent against her son in a subsequent action by her for dower founded on the same facts. The fact that he had alleged in this action and sought to prove the validity of the marriage would be competent against him as an admission; but the judgment would not be competent against him as an adjudication on that point, in her action for dower.

In an action of ejectment by a son to establish his right to inherit from his father, the fact of marriage between the father and mother being in issue, a judgment recovered against his father, by the father of his mother, on the ground of his alleged seduction of the mother, is not competent; for neither the plaintiff in the ejectment nor his mother was a party to it.

Although where cohabitation between a man and a woman has been shown, declaration of the parties made during cohabitation and characterizing it as matrimonial rather than meretricious are competent, as part of the *res gestae*; such declarations are not competent on that ground (except against the party making them), unless there was cohabitation.

The declaration of the supposed husband or wife in an alleged marriage, even though there was never cohabitation, is competent after the death of the declarant, as evidence in an action by issue of the marriage, to establish legitimacy and the right of inheritance.

The exception which allows admission of hearsay evidence in the case of pedigree, is not confined to ancient facts nor to matters part of the *res gestae*.

Admissions, while competent evidence of a marriage, are nevertheless unsatisfactory and may be open to grave doubt.

The plaintiff brings this action of ejectment, as the son and sole heir-at-law of one Peter O. Eisenlord, who died in Montgomery county on the 30th day of June, 1885, seized in fee simple and possessed of the premises described in the complaint.

The defendants other than Clum are respectively the brothers, sisters or nieces of the deceased Eisenlord, and claim that they are his sole heirs-at-law, and the defendant Clum is in possession of the premises described in the complaint and claims under the other defendants as tenant.

The plaintiff is the son of one Margaret Lipe, and the question in issue depends upon whether she was married to the deceased Eisenlord prior to this son's birth. The plaintiff endeavored to prove an actual marriage between the deceased and his mother prior to his birth on the 21st of October, 1857, and for that purpose called among others his mother, then married to one Austin. The plaintiff offered to prove by her various conversations between the witness and the deceased upon the subject of their getting married, and also offered to prove by her the performance of the marriage ceremony between them by a justice of the peace in Montgomery county, at a time anterior to the plaintiff's birth.

All the evidence was objected to by defendant's counsel and was excluded by the court, on the ground that the witness was interested and came within the provisions of section 829 of the Code because if she established the fact that she was married to

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the deceased, she would then be entitled to dower in this real estate.

Judgment was entered for defendant.

The Supreme Court at General Term affirmed the judgment, holding that she was interested in the event, as a judgment in favor of the plaintiff would furnish her evidence to claim her dower. [*As to seduction case*], it held, that this record was competent to prove the status of his father with respect to his mother, although plaintiff was not a party to the record.

The Court of Appeals reversed the judgment.

PECKHAM, J. [*after stating the facts*]: The witness was not a party to the action, and hence could not be excluded as having any interest on that ground. Nor was she a person from, through or under whom the plaintiff derived any title or interest by assignment or otherwise. His title or interest, if any, came through Eisenlord, and that, of course, depended upon the question whether the plaintiff was his legitimate son.

The only other ground of exclusion contemplated by the statute refers to a person "interested in the event of the action."

Prior to the adoption of the Code the law excluded interested witnesses from testifying. What amounted to such an interest as would exclude a witness was a question which was frequently presented, and in almost every conceivable phase, and the courts had finally settled down to a general rule on the subject, which had long prevailed before the legislature altered it.

At common law, as the rule became developed by successive decisions, the interested witness was excluded only when he had what was termed a *legal interest in the event of the action*. A direct and certain interest in the event of the cause or an interest *in the record* for the purpose of evidence, became necessary in order to exclude (Starkie on Ev., Marg. Pgng., 23, 24, 9th ed., 1849).

The inclination of the courts was towards a holding that the fact of interest should go to the credit rather than to the competency of the witness, and hence they said that the party alleging incompetency must show it beyond doubt. The English

legislature interfered with the rule as to *the record*, and provided that it should not be evidence in another action for or against the witness who testified (3 and 4 Will. IV., ch. 42, § 26). Then, under the suggestion of Lord Denman, another act was passed limiting very greatly the cases in which a person should be excluded by reason of interest (6 and 7 Vic., ch. 85).

In this state the question arose at an early date and in one of the pioneer cases, *Van Nuys v. Terhune* (3 Johns., Cas. 82) the rule as above stated was declared as the law. It was therein explained that a witness was not interested in the event of the cause unless he would gain or lose by the event, and he was not interested by *the record*, unless the verdict would be given in evidence for or against him in some other proceeding. In a note to this case it is stated that the rule was formerly that an interest in the question put to the witness excluded him, but it was admitted that such rule had been explained away and limited, so that the one announced in the case was the true rule. This case was decided in 1802. In *Jackson ex dem. v. Bard* (4 Johns., 230), it was held that the widow of one Dickenson, who was the mediate grantor under whom the defendant claimed the land in question, was a competent witness, although it was argued she might claim dower in case the deed had not been executed. The Supreme Court held the decision correct, and said she was not an interested witness because the verdict in the cause could never be given in evidence in an action of dower brought by her.

Then in *Jackson ex dem. v. Van Dusen* (5 Johns., 144), which was an action of ejectment, it was distinctly held that the widow of a person deceased was a competent witness in an action brought by the heir to recover the possession of lands claimed under her husband though she would be entitled to dower in such lands. Van Ness, J., delivered the opinion of the court and said the witness had no other interest in the case than that which grew out of her right or dower in the premises and as to that the verdict in the cause would be no evidence in a suit to be brought by her for the recovery of her dower.

In *Jackson ex dem. v. Nelson* (6 Cow., 248) it was held that in an action of ejectment against a devisee, a co-devisee and tenant in common with the defendant, not in actual possession, might

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be a witness for defendant, because the effect of a recovery by the plaintiff would not be to turn him out of any possession, nor could the verdict be evidence for or against him in any other suit.

Again in *Jackson ex dem. v. Brooks* (8 Wend., 426, 431) an action of ejectment it was held that a tenant by the courtesy was a competent witness for the plaintiff, who was the heir-at-law. The court said the witness could not use the verdict if the plaintiff recovered, as evidence in his favor in any suit he might bring to enforce his title as tenant by the courtesy, and hence he had but an interest in the question and not in the event of the suit (see also *Peake on Ev.*, *Norriss' Notes*, 209, Pt. 1, ch. 3, § 3; 1 *Greenl. on Ev.*, § 386, *et seq.*). The interest must be certain, direct, not contingent or remote, or a mere possible benefit.

Under the rule of the common law on the subject of interest it is plain that the mother in this case would have been a competent witness. She had no interest in the event of the suit as that expression has been defined by the courts, and the judgment would not have been any evidence for or against her in any action she might bring. I think the expression "interest in the event" as used in our statute was never intended to enlarge the class to be excluded under it beyond that which the common law excluded in using the same language.

All legislation on the subject has been in favor of greater liberality in the rules relating to the competency of witnesses. Upon referring to the cases which have been decided under the section of the Code already referred to, we find that the rule defining what is an interest in the event is laid down in about the same terms as those used by the common law (*Hobart v. Hobart*, 62, N. Y., 80; *Nearpass v. Gilman*, 104 *id.*, 506; *Wallace v. Straus*, 113 *id.*, 238; *Connelly v. O'Connor*, 117 *id.*, 91).

But the learned General Term, upon the appeal in this case, has held the exclusion was proper on the ground that the judgment would furnish the witness with important evidence to establish her claim to dower in the premises described in the complaint. The cases I have cited show conclusively that such a judgment would not been admissible in evidence at common law in any such action, either for or against the witness, and in this respect the Code has not changed the rule.

The case of *Miller v. Montgomery* (78 N. Y., 282), is cited to show that the record would be legal evidence for or against her. A surety upon the bond of a non-resident executor was there held to be interested in the event of the accounting of his principal. This was so held because the surety is bound by the decree of the surrogate made upon a regular accounting, and such decree would be evidence against the surety in a suit upon the bond. Within all rules such a witness is interested and is incompetent to testify to a personal transaction with the deceased.

The General Term also thought the judgment would be evidence as a declaration or admission by the plaintiff of the facts or some of them which the witness would have to prove in her action against him for dower. Any declaration or admission made by the plaintiff as to any fact material for the witness to prove in her action is undoubtedly admissible as an admission. If found in a pleading and it be shown that it was placed there with the knowledge and sanction of the plaintiff herein, such pleading would be admissible for the purpose of proving such admission (*Cook v. Barr*, 44 N. Y., 156). In order however, to prove such admission, it is not necessary or proper to put in evidence the judgment in the action, for it is not the judgment which furnishes the proof, but the admission contained in the pleadings, and the judgment is not in that case the least evidence in favor of the witness in any action she might bring. The admission would exist without the judgment and regardless of it.

That the witness has an interest in the question is very plain, but I am aware of no principle that would permit the introduction of this judgment as any proof for or against the witness in any other action. I see no foundation for any estoppel as against the plaintiff herein in an action brought by the witness to recover her dower. If, as I say, he has made admissions they may be proved, but to say that he is estopped in the action for dower from denying any fact upon which the right of the plaintiff in such action depends, because, in another action between himself and a third party it was necessary for him to prove the same fact, would be a great extension of the doctrine of estoppel. If in the course of such first trial the plaintiff had ad-

mitted by his own testimony any fact material in the dower action it would be an admission which could be taken advantage of by proving that it was made, but if the fact had been proved by some third party instead of by the plaintiff, it is not in that event an admission or declaration of the plaintiff therein, which renders a judgment in that action proof against him in any future controversy with a third party.

The cases cited from 1 Greenl. on Ev. (§ 527 a) are those where it was claimed the party had made an admission in a declaration or other pleading, or had suffered default, and it was held such express admission, or such constructive admission by suffering a default, was competent evidence against him. We do not doubt the correctness of this rule. It is not the judgment which is to form the evidence. It is the admission contained in the pleading or by the suffering of the default.

Our conclusion is that the mother of the plaintiff was a competent witness to prove any or all facts of which she was cognizant and which were material and which were not inadmissible upon some ground other than the alleged interest of the witness in the event of the action.

Second. Another question arises upon the reception in evidence against the objection of the plaintiff, of the judgment in the action of John A. Lipe v. Peter O. Eisenlord. It was an action brought by Mr. Lipe (who was the father of Margaret Lipe, the mother of the plaintiff in this action), against the defendant on account of his alleged seduction of the plaintiff's daughter, Margaret, and in which action the plaintiff recovered a verdict, upon which judgment was entered in his favor.

I see no ground on which to permit its introduction in this action. The plaintiff here was no party to it, nor was his mother, Margaret Lipe. The judgment established no *status* of the plaintiff's mother. As a judgment it simply established the fact which was conclusive on all parties and privies thereto, that in 1856, the defendant had seduced the plaintiff's daughter, Margaret Lipe. Neither the plaintiff in this action nor his mother was a party or privy to it. In that class of judgments, which touch the subject of marriage or divorce, and either establish a marriage or decree a divorce between the parties, it has

been held that under certain circumstances and within proper limitations as to jurisdiction, etc., such judgments are binding and of universal obligation. It is upon the same principle that the decree of a court *in rem* is conclusive upon the title to the *res* adjudicated upon (1 Greenl. on Ev., §§ 543, 544 and notes).

But this is no such judgment. It adjudges no status and is conclusive of the facts therein adjudged, simply between the parties and privies thereto and the plaintiff occupies neither position. If the witness had been sworn and had testified to facts upon this trial, which it was claimed were inconsistent with what she swore to on the trial of the seduction case, upon her attention being called thereto and a proper foundation laid, such contradictory and inconsistent declarations or evidence, if material, could have been proved with a view to impeach her evidence upon this trial.

We think the judgment spoken of was not admissible in evidence against the plaintiff. A third question arises upon the exclusion of declarations said to have been made by Eisenlord at times long subsequent to the time when this alleged marriage ceremony took place. One witness was called and the plaintiff offered to prove by him that Eisenlord had said to him, in 1863 or 1864, that he was married and had a wife, and that it was Margaret Lipe. The plaintiff offered to prove by another witness that Eisenlord had said he was married and had an heir, a son, the one witness had teased him about, the plaintiff herein. This was in 1867 or 1868. Eisenlord died in 1885. The evidence was objected to as incompetent and as not characterizing any act or thing which could render it admissible. The objection was sustained and the plaintiff excepted.

The fact is undisputed that the deceased Eisenlord and Margaret Lipe never lived together or cohabited as man and wife. No declarations of his could therefore characterize or explain the nature of a cohabitation which confessedly never existed. It is equally undisputed that Eisenlord never had anything to do with this alleged son. They never lived together, and if they ever met, there is no proof of such fact aside from the possible inference arising from some of the alleged declarations, and they only went to the extent of an inference that

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Eisenlord had seen the plaintiff. These declarations, therefore, did not in any manner characterize or explain the footing upon which the plaintiff and Eisenlord had ever lived together, or even met.

Under such circumstances, the question arises as to the admissibility of the proposed evidence for the purpose of proving, or as corroborative proof of a marriage in an action of this nature. They might be admissible upon the trial of an action to which the person making them was a party.

It has been held in England and in some of the states of this Union that evidence of declarations as to a former marriage was competent on the trial of an indictment for bigamy against the party making them. (1 Whart. on Ev., § 86, and note; Miles v. U. S., 103 U. S., 304.)

But in this state it has been held that such evidence was not sufficient, in a prosecution for bigamy, to establish a marriage, even against the party making the admissions. (People v. Humphrey, 7 Johns., 314; Gahagan v. People, 1 Park, Cr. 378.)

The court in the latter case held them admissible to corroborate the proof of the actual marriage. In cases where a cohabitation between a man and woman was proved at the time when the declarations of the parties were made, they have been admitted in evidence, even in the life-time of the parties making them, upon the principle that they were a part of the *res gestae*, accompanying, characterizing and explaining the nature of that cohabitation as being matrimonial, rather than meretricious. They were admitted as competent proof, corroborative of the claim of a marriage between the parties so cohabiting. It was stated that proof of cohabitation, conduct, reputation, reception in family and in society, holding each other out as husband and wife, all tended to prove a marriage, and that in a perfect case they all combined, the lesser facts attending upon and explaining the material and important fact of cohabitation. These principles are illustrated in the authorities herein cited (1 Bish. on M. & D., § 439; 1 Ph. Ev., Cow., Hill & Edwds. Notes pg. 252, Note 91; Read v. Passer, 1 Esp., 213; Leader v. Barry, *id.*, 353; Matthews on Presump. Ev., 283; Fenton v. Reed, 4 Johns., 52; In re Taylor, 9 Paige, 611; O'Gara v. Eisenlohr,

38 N. Y., 296; Chamberlain v. Chamberlain, 71 *id.*, 423; Badger v. Badger, 88 *id.*, 546). All these cases do not speak of the principle upon which the declarations were admitted, but it plainly appears that there was cohabitation, and the declarations, reputation, holding themselves out as married persons, etc., all came in as adjuncts to strengthen the inference and to corroborate the presumption of marriage resulting from such cohabitation and as explanatory thereof, and therefore as part of the *res gestae*.

How far the principle of *res gestae* extends was somewhat discussed in Badger v. Badger (*supra*), by Finch, J., but the point here was not decided. I do not see that these declarations in the face of evidence that there never was any cohabitation between the parties, can be claimed to have been part of the *res gestae*, even under the most extended definition of that term, and some other ground must be sought for their admission, if they be competent at all.

It seems to me that they are competent as hearsay evidence in a case of pedigree. Such a case is a well known and recognized exception to the general rule excluding hearsay evidence. This case involves without doubt a question of pedigree simply. It is what is termed in the books, a purely genealogical controversy. Peter O. Eisenlord, is, upon the plaintiff's claim, the common ancestor of all the parties, while the defendants only deny the plaintiff's relationship to him. The sole question involved is as to this relationship of the plaintiff, and that depends upon the fact of a marriage having taken place between Eisenlord and the plaintiff's mother before his birth. The exception regarding the admission of hearsay evidence in case of pedigree is not confined to ancient facts, but extends also to matters of pedigree which have recently transpired; and the hearsay as to deceased witnesses is admitted as to facts which have occurred in the presence of living witnesses. (1 Ph. on Ev., Cow., H. & Edws. notes, pg. 248, Vowles v. Young, 13 Ves., 140.) Matters of pedigree consist of descent and relationship, evidence of declarations of particular facts, such as births, marriages and deaths (*id.*, 251).

In cases of pedigree, hearsay evidence of declarations of persons who from their situation were likely to know, is admissible

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when the person making the declaration is dead. (Jackson ex dem. Ross v. Cooley, 8 Johns., 128.)

It is not the question whether such evidence is sufficient to prove the marriage, but only whether it is competent. In many cases it will be readily seen, such evidence may, under the circumstances, be the only evidence which can be obtained, and there might be no evidence of cohabitation. In those cases the declarations might be less open to criticism, and entitled to much greater credence than where the facts were recent, and other evidence readily attainable, if the truth were in that direction. The weight to be given this kind of evidence depends upon the facts surrounding each particular case. It is plain, however, that in cases of pedigree the declarations to be admissible need not be a part of the *res gestae*, for if they were, they would be admissible on that ground, irrespective of any question of their admissibility as in a case of pedigree. The exception to the general rule in the latter case takes a wide range. Traditional declarations become the best evidence sometimes, when those best acquainted with the fact are dead. When derived from those who are most likely to know the truth and are under no bias to misrepresent the fact, such evidence affords a reasonable presumption of the truth (Starkie on Ev., pg. 47, 9th Am. ed., 1879).

Upon questions of pedigree, *i. e.*, in a controversy merely genealogical, hearsay evidence is allowed as to the time of birth of a certain party, as to a marriage, death, legitimacy or the reverse, consanguinity generally, and particular degrees thereof, and of affinity (Per Knight-Bruce, V. Chan, in Shields v. Boucher, 1 DeG. & Sm., 40-52). The term pedigree, says Greenleaf, embraces not only descent and relationship, but also the facts of birth, marriage and death, and the times when these events happened, and the rule permits hearsay evidence of the declarations of deceased members of the family upon these points in any case involving pedigree (1 Greenleaf on Ev., §§ 103, 104). The declarations to be admissible need not be upon the knowledge of the declarant. If this was so the main object of permitting hearsay evidence would be frustrated, as it seldom happens that the declarations of deceased relations embrace matters within

their own personal knowledge. Thus evidence, that a deceased member of the family said that he heard from others of his family the facts which he states, is admissible (1 Whart. on Ev., § 205; Doe ex dem. *Banning v. Griffin*, 15 East., 293; Doe ex dem. *Futter v. Randall*, 2 Moore & Payne, 20). The evidence is of course not rendered less admissible where the declarant knows the fact which he declares. For the purpose of proving a marriage in cases of pedigree where the object is to trace relationship, the declarations of deceased members of the family are competent (1 Whart. on Ev., § 212).

It has been stated that declarations in regard to particular facts are not competent. This is true in cases where proof of a custom right of way of common, and the like is offered. But in a case of pedigree it is always a particular fact that is to be proved, and in relation to which the declarations of the deceased person are offered, and in such cases the particular facts stated, such as birth (place or time where material), marriage and death are competent (1 Ph. Ev., Ch. Edws., notes, M. Pg., 251; Whart. on Ev., § 209).

In respect to such proof of particular facts it has been said that "a birth however from a single woman, a birth from a married woman, a death, a marriage is a particular fact, or a single act which, of course, is provable by hearsay (hearsay from a proper quarter), on a question of pedigree" (Per V.-Chan. Knight-Bruce, in *Shields v. Boucher*, *supra*).

The only case looking to the contrary that I have found, is *Westfield v. Warren* (8 N. J. L., 249), where Ewing, Ch. J., said that where marriage was to be shown as a substantive, independent fact, it was within none of the exceptions to the general rule, and that hearsay evidence could not be received. The case was one regarding the settlement of a pauper and might well have been placed upon the ground that it was not a case of pedigree at all. In *Rex v. Erith* (8 East., 539), Chief Justice Ellenborough held in a case of a settlement of a pauper, that it was not a case of pedigree but simply a question as to what place an undisputed birth derived from acknowledged parents had taken place in.

I think it entirely clear, that from the nature of the case, as

well as upon authority, a case of pedigree forms an exception to the general rule as to proof of a particular fact by hearsay, reputation or tradition. As to what is a case of pedigree, an examination of the question shows that a case is not necessarily one of that kind, because it may involve questions of birth, parentage, age or relationship. Where these questions are merely incidental and the judgment will simply establish a debt, or a person's liability on a contract, or his proper settlement as a pauper, and things of that nature, the case is not one of pedigree, although questions of marriage, legitimacy, death or birth are incidentally inquired of (*Whittuck v. Waters*, 4 C. & P., 375).

Thus, in *Haines v. Guthrie* (L. R. [13 Q. B. D.], 818), it was held both in the Queen's Bench Division, and in the Court of Appeals, that declarations of a deceased father were not admissible in evidence to prove the age of his son, who had been sued for the price of a horse sold him, and who had set up the defense of infancy. They would have been admissible, the court stated, if the case had been one of pedigree.

BRETT, M. R., in the course of his opinion in the Court of Appeals, shows the absence of those facts which make up a case of pedigree, for he says, "What the family of the defendant is, is immaterial, whose son he is, is immaterial, whether he is a legitimate or an illegitimate son, is immaterial, and whether he is an elder or a younger son, is immaterial. No question of family is raised in the case." It simply involved the point of the age of a defendant for the purpose of thereby determining his liability upon a contract which he had made, and upon which, if of age, he was liable. The judgment would in such case establish no fact in any contest the defendant might have in regard to property depending upon his being a member of his father's family, or his age, at any particular time. It was not at all genealogical controversy, but a mere collateral issue, and hence the rule in pedigree cases did not apply. In the case at bar, however, the case is solely one of pedigree, and the evidence must be judged of with regard to this fact.

The case of *In re Taylor* (9 Pai., 611), where the chancellor held that the declarations of one of the parties, made after the cohabitation had ceased, could not be admitted in evidence, was

not a pedigree case, but only involved the appointment of a committee for the father, who was insane, and such declarations were held inadmissible as not being a part of the *res gestae*.

A careful examination of the question has led me to the conclusion that the evidence of Flanders and Saltsman, regarding Eisenlord's declarations should have been received as in a case of pedigree. Other evidence, of course, may be offered that may be definite enough to be competent, though most of what was offered, other than that to which I have alluded, was altogether too vague to be admissible. It identified no one, and really amounted to nothing.

Although admissible, the evidence is liable to grave suspicion. Indeed, we are bound to say that this whole case presents itself as full of suspicion. The silence of the woman during all these years as to the marriage, silence which was continued until the death of her alleged husband, is in and of itself a suspicious fact. Admissions of a marriage are, under such circumstances, most unsatisfactory and open to grave doubt. If such declarations were in truth ever made, there may have been motives which it is impossible to fathom, and which may at the same time have operated upon Eisenlord, and induced him to make an admission of this kind when it was wholly untrue. Where the facts are of comparatively recent occurrence, and the alleged declarations of the deceased are at war with his known actions during his life, and where there was no cohabitation or recognition of the party as wife or husband, it may be averred that the evidence is to be looked upon with very great distrust. Still, within the authorities the evidence is competent. Under our rulings there may be evidence enough in the case to require its submission to a jury.

The judgment must be reversed and a new trial granted, costs to abide event.

All concurred, ANDREWS and FINCH, J J., on first two grounds.
Judgment reversed.

Heft v. Ogle. 127 Pa. St., 244.

HEFT v. OGLE.

Supreme Court of Pennsylvania, 1889.

[Reported in 127 Pa. St., 244.]

Where an executor or administrator sues on a claim in favor of the estate, a legatee or distributee, who has parted with his interest by release—or *it seems* by payment or assignment—is competent as a witness for the plaintiff, unless there is some other ground of exclusion than that he is a legatee or distributee.

Assumpsit by an administrator for money lent by the decedent.

At the trial, the administrator, Frank Ogle, who was the son of the decedent, called his sister, Maria S. Ogle, as a witness to prove the loan.

She was objected to as incompetent, being the daughter of decedent, whereupon the following paper was produced :

“Know all men by these presents, that I, Maria S. Ogle, do hereby for myself, my heirs, executors and administrators, absolutely release, assign, transfer and discharge unto Frank E. Ogle all my right, title and interest of whatsoever kind, either in law or equity, of, in and to any sum or sums of money which may be recovered in or which may result from the action of Frank E. Ogle, administrator, against Jacob D. Heft, surviving partner, now pending in the Court of Common Pleas No. 1, of September Term, 1884, No. 486, and do discharge him from any liability or accountability to me in any form whatever for any sum or sums of money which may be recovered in said action.

“Witness my hand and seal the twentieth day of September, A. D. 1884. [Signed] *Maria S. Ogle.* [L. S.]”

The witness testified that there existed no other agreement between herself and her brother than the writing produced, and that she had no interest in the moneys sought to be recovered.

The defendant's objection having been renewed, it was overruled, and witness was admitted to testify generally.

In the Court of Common Pleas a verdict was returned for the plaintiff.

The Supreme Court affirmed the judgment.

STERRETT, J. This suit was brought by Frank E. Ogle, administrator of Mary F. Ogle, deceased; against Jacob D. Heft, who survived Harry S. Ogle, late partners as Heft and Ogle, to recover money alleged to have been loaned to said firm by plaintiff's intestate, Mary F. Ogle, who died leaving as her only heirs-at-law, four children, viz., Maria S., Harry S. (deceased member of Heft & Ogle), Frank E. (the administrator), and Caroline Ogle.

On the trial, plaintiff below called his sister, Maria S. Ogle, to substantiate the claim in suit. The witness being objected to as incompetent, he proved and put in evidence a paper, signed and sealed by her, wherein she absolutely releases, assigns and transfers to her brother, Frank E. Ogle, individually, all her "right, title and interest of whatsoever kind, either in law or equity, of, in and to any sum or sums of money which may be recovered or which may result from" this suit, and discharges "him from all liability or accountability * * * * * in any form whatever, for any sum or sums of money which may be recovered in said action." The witness also testified, on her *voir dire*, that there was no other agreement between herself and her brother, and that she then had no interest in the fund. The objection was overruled, and bill sealed for defendant below.

The question thus presented in the first specification is, whether the learned judge erred in ruling as he did. We are of opinion that he did not. The witness was not a party to the record. She was neither the owner nor the assignor of the claim in suit; nor could she, individually, in her own right, ever have been plaintiff in an action to recover the same. She was not a party in interest, because prior to suit brought, she absolutely released and transferred to her brother, individually, all the interest she ever had or could have in the amount that might be recovered. She was therefore competent to testify, and no policy of law excluded her. On the contrary, the policy of the law is rather to favor the admission of witnesses who are divested of all interest. Whenever it is practicable to do so, the tendency of modern legislation, as well as judicial decision, is to let questions of

policy, interest, etc. go to the credibility, rather than to the competency of witnesses.

On principle as well as authority, it ought to be considered settled that in an action by an executor or administrator, based on a claim in favor of the estate he represents, a legatee or distributee who has parted with his interest, either by release, payment or assignment, is a competent witness for plaintiff, unless there is some ground of exclusion other than the fact that he is a legatee or distributee, and as such was previously interested in the result of the suit: 1 Greenl. Ev., §§419, 430; Miller on Witnesses, 58; Scott v. Lloyd, 12 Pet., 145; Gebhart v. Shindle, 15 S. & R., 235; Dellone v. Rehmer, 4 W., 9; Commonwealth v. Ohio & P. R. Co., 1 Gr., 348; Cornell v. Vanartsdalen, 4 Pa., 364; Carter v. Trueman, 7 Pa., 315; Steininger v. Hoch, 42 Pa., 432; Forrester v. Torrence, 64 Pa., 29; Brant v. Dennison, 3 East'n. R., 9; s. c., 1 Cent. R., 400.

In some of our cases there is more or less confusion of thought, arising from the failure to properly distinguish those of the class to which the one now before us belongs, from cases in which the proffered witness was either actually or substantially a party to the suit, or in which he was the assignor of the thing or contract in action, a party to a negotiable instrument, or otherwise incompetent on the ground of public policy. In Haus v. Palmer, 21 Pa., 296; Montgomery v. Grant, 57 Pa., 243; Grayson's App., 5 Pa., 395; Bailey v. Knapp, 19 Pa., 193; Hatz v. Snyder, 26 Pa., 511; Fross' App., 105 Pa., 258, 266, and kindred cases, witnesses were excluded for one or other of the reasons above stated. Some of those grounds of exclusion are now greatly restricted by legislation of comparatively recent date.

In Commonwealth v. Ohio & P. R. Co., *supra*, Mr. Justice Black notices the distinction between an interest that is collateral and one that is direct, as follows: "When the interest of the witness is collateral, his competency may be restored by a release or transfer of it. The rule in Post v. Avery applies only to persons who have assigned choses in action on which the recovery would have been for their own use, if no assignment had been made. Its object is to prevent a party from transforming himself into a witness by the magic of a bit of paper. It

forbids one who assigns a claim to sell his oath along with it. But a person who has a merely incidental interest in the result, an interest which arises entirely out of the fact that the record may be evidence for or against him in some other action, may divest himself of such interest, and if he does so at any time before he is offered as a witness, his testimony must be received. For instance, a stockholder in a corporation may transfer his stock and become a witness for the company; a legatee may dispose of his interest in the estate and testify for the executors; an attorney who has a contingent fee may release it and give evidence in favor of his client. * The rule in question is not leveled against interested witnesses, but is founded in the policy of stopping a disinterested party from testifying in favor of one who sues in his right."

Brant v. Dennison, *supra*, was an action of ejectment against a mortgagor by the administrators of the mortgagee who died intestate, unmarried and without issue. On the trial, a niece and heir-at-law of the intestate, and wife of one of the administrators, was called by them to sustain the mortgage on which the action was based. Being objected to as incompetent, because she was the wife of one of the plaintiffs and also a distributee of the estate represented in part by her husband, and therefore interested, it was shown that she had previously executed and delivered to a third party an assignment of all her interest in the mortgage in controversy; and on the authority of *Carter v. Trueman*; *Steininger v. Hoch*, and kindred cases, it was held that inasmuch as she was not a party to the suit, either actually or substantially, and her interest as distributee, so far as the claim in suit was concerned, having been divested by the assignment, she was a competent witness. In principle, that case is not essentially different from the one under consideration. The first specification of error is not sustained.

[*Here followed a ruling on the rejection of another offer of evidence in the Court below, it being held, no error.*]

Judgment affirmed.

O'Brien v. Weiler, 68 Hun, 64.

O'BRIEN v. WEILER.*

New York Supreme Court, 1893.

[Reported in 68 Hun, 64.]

In an action by or against the executor to recover alleged assets, a release by the interested witness to the estate of all claim to and interest in such assets is sufficient, because that precludes all pecuniary advantage to the witness from a recovery; and the fact that other distributees or legatees will gain by a recovery is not material.

Action on a savings bank account.

Peter T. O'Brien, the plaintiff's testator, made a gift or created a trust in favor of his daughter by opening an account in a savings bank in his name as guardian of his daughter.

* The deposit having accumulated interest for several years, the father invested a similar sum in railroad bonds and delivered them to his daughter who accepted them in lieu of the bank account. The father and daughter having both died, their representatives respectively claimed the money standing to the credit in the bank account.

Upon the trial, the widow of the testator, having released her husband's estate from all claim and interest in respect to the moneys involved in the action, was called by the plaintiff as a witness to testify to the transactions and communications between her husband and the deceased daughter; and between herself and the deceased daughter.

It was objected that she was excluded from testifying under section 829 of the Code of Civil Procedure.

The Supreme Court at Special Term entered judgment for plaintiff.

The Supreme Court at General Term affirmed the judgment.

VAN BRUNT, P. J. [*on this point said*]: It is claimed that because the witness did not release all her interest in the estate, or which she might acquire under the will, therefore she was not competent. It is undoubtedly true that a legatee or devisee under a will is incompetent to testify to personal transactions

or communications with the deceased, preceding, attending or succeeding the execution of the will, in support of which proposition various authorities may be cited. But it is equally true that a party may become competent by releasing his interest in the subject matter involved; and, therefore, when the witness released and discharged the estate of and from all interest or claim she might have in and to the moneys involved in this action, she was no longer a party or person interested in the event of the action, and consequently did not come within the prohibition of section 829. All the cases cited by the learned counsel for the appellant in support of the claim that there must be a release of all interest under the will in order to enable a legatee or person interested in the will to become a competent witness as to personal transactions or communications between the witness and the testator, were those relating to the validity of the will itself, and consequently, without such a general release, interest still remained. Those cases, therefore, are entirely different from one in which it is simply sought to collect a debt due to the estate; and, as already observed, where the legatee under the will releases all his interest in or claim to such debt or any income derivable therefrom, it is apparent that all interest in the event of the litigation has ceased, and the witness has become competent. The mere fact that such release swells the interest of other legatees, does not in any way continue the interest of the witness who has released the same.

The claim that there was no evidence to sustain the finding of the court below to the effect that the testator advanced out of his own money the sum invested for the use of his daughter in the purchase of the Second Avenue Railroad bonds, and that his daughter received the same as the equivalent of her money deposited in the bank, is certainly not well taken. The evidence of the widow was clearly to the effect that the daughter accepted the bonds purchased by her husband in lieu of the money deposited in the bank; and even if the books of the bank showed that no money had been taken from the bank at the time, but that the interest continued to accumulate until the death of the testator, it was a substitution of the bonds for the money, by and with the consent of the beneficiary.

Matter of Will of Wilson, 103 N. Y., 374.

The claim that it was error to permit the widow as the mother of the deceased daughter, to testify to conversations she claimed to have had with her, not in the presence of the testator, in regard to the property which is the subject of this action, does not seem to have any foundation. It is claimed that the release given and put in evidence was not applicable to the daughter, and, therefore, did not make her mother a competent witness. The question was not whether it was applicable to the daughter or not. The point was that by the giving of the release the widow had ceased to be interested in the event of the litigation, and, therefore, she was just as competent a witness as though she never had any interest whatever in this particular money under the will of her husband.

[*Ruling on other subjects is here omitted.*]

Judgment affirmed.

MATTER OF WILL OF WILSON.

New York Court of Appeals, 1886.

[Reported in 103 N. Y., 374].

One named in a will as executor is not disqualified from testifying as a subscribing witness upon its probate.

The fact that such executor will be entitled to a legacy under the will, if it be proved, will not prevent his testifying, where he has released his legacy by sufficient release under seal.

The executor propounding a will for probate is not such a party to the proceeding as to be, therefore, incompetent therein.

His right to commissions as executor is not an interest which renders him incompetent.

The residuary legatee who will gain thereby, will take nothing in right of the releasing legatee nor by, through or under any right of his.

Probate of a will, was contested on the grounds, that, at the time it was claimed that John Wilson executed the will, he had not sufficient testamentary capacity to make a valid disposition of his property, and that he never executed the will, and that it was a forgery.

At the trial, one Hart, who was executor and legatee under the will, presented it for probate and offered himself as witness

to prove conversations and transactions between himself and the deceased.

This was objected to, as incompetent, under N. Y. Code Civ. Pro., § 829, both because he was a party to the proceeding and also by reason of his interest in the event.

The proponent, thereupon offered in evidence a release to the administrator, of his interest as legatee under the will.

Objected to by contestant's counsel, as being entirely improper and immaterial to the litigation. Objection overruled and release received and read in evidence.

The *Surrogate* admitted the will to probate.

The Supreme Court at General Term affirmed the decree.

The Court of Appeals affirmed the judgment of the General Term.

RUGER, Ch. J. [*after stating the facts*]: We think the questions presented have been settled by authority against the contention of the appellants.

The interest, which the witness might have taken as legatee under the will, was effectually discharged by the release. It was an instrument under seal importing a consideration, and its effect was to swell the residuum of the estate and increase the amount to be distributed under the provisions of the will. The residuary legatee took nothing thereby in the right of the releasing legatee, and did, in no sense, succeed to the sum derived from, through or under any right of such legatee.

Neither was the witness incompetent by reason of being a party to the proceeding, or as being interested by way of commissions as executor. It was held in the case of *Children's Aid Society v. Loveridge* (70 N. Y., 387), that an executor was not such a party to the proceedings to prove a will, as would preclude him from testifying to personal transactions with the deceased testator, within the spirit and meaning of section 399 of the Code of Procedure.

Neither did his right to compensation as executor render him incompetent by reason of interest to testify to such transactions. This rule was approved and followed in *Rugg v. Rugg* (83 N. Y.,

592). The same question was decided in a similar manner in *Reeve v. Crosby* (3 Redf., 74). In *McDonough v. Loughlin* (20 Barb., 238), the proposed witness was an executor and trustee under the will as well as a subscribing witness. The question was whether the execution of the will could be proved by him, without working a forfeiture of his appointment as executor, and the devise to him as trustee, under 2 Revised Statutes, page 65, section 50, avoiding any beneficial devise, legacy, interest or appointment to subscribing witnesses. It was held that it could, inasmuch as the devise to him was in trust, he taking no beneficial interest therein, and his appointment as executor was fiduciary, and not for his own benefit. It was said that the commissions were given by statute as compensation for services, and did not accrue to the executor as a gratuity by force of the will. The claim and appointment were not beneficial within the meaning of the statute. It is said in the same case that the doctrine of the English Courts is to the same effect, citing 1 Mod., 107; *Lowe v. Jolliffe* (1 W. B., 365); *Holt v. Tyrrell* (1 Barn. [K. B.], 12); *Bettison v. Bromley* (12 East., 250).

We find no cases in this state conflicting with the principles laid down in those referred to. In *Lane v. Lane* (95 N. Y., 494), the proposed witness was not only an executrix, but also a legatee, and it was properly held, she not having released her claim as legatee, that she was an interested party.

[A ruling as to costs is here omitted.]

All the judges concurred in affirming the judgment.

NOTES OF OTHER RECENT CASES, ON WHO IS DEEMED INCOMPETENT AGAINST AN ESTATE, ETC.

I. *Party, or person under whom a party claims :*

Colorado: Cooper v. Wood, 27 Pacific Rep., 884 (in a suit against the surviving partner and the representative of the deceased member of a firm, the survivor is an incompetent witness to establish the partnership with deceased). *Georgia:* Hooks v. Hays, 1891, 13 Southeast. Rep., 134 (a person not a party or interested may testify as to a transaction with deceased). *Illinois:* Robnet v. Robnet, 43 Ill. App., 191 (in an action against a decedent's estate for services the administratrix is not disqualified from testifying in plaintiff's behalf). *Indiana:* Scott v. Harris, 1891, 27 Northeast. Rep., 150 (in partition of decedent's lands upon the issue as an advancement to a son, the widow, though a party to the action is not interested). *Kentucky:* Beach v. Cummins, 1892, 18 Southwest. Rep., 360 (in a suit by two beneficiaries against the executor of deceased trustee to establish the trust, each may testify in favor of the other as to conversations with deceased). *Michigan:* Penny v. Croul, 1891, 49 Northwest. Rep., 311 (in an action to recover bonds delivered by plaintiff's intestate to defendant, defendant may testify that he held them as an executor of another; the contest being between the two estates, defendant is not an "opposite" party). *Minnesota:* Darwin v. Keigher, 45 Minn., 64; s. c. 47 Northwest. Rep., 314 (an agent of a party is a competent witness as to transactions with deceased); Bowers v. Schuler, 1893, 55 Northwest. Rep., 817 (a party to an action means a party to the issue to which the testimony relates and not a mere party to the record). *Missouri:* Baer v. Pfaff, 44 Mo. App., 35 (agent of a party is a competent witness as to transactions with deceased); Ford v. O'Donnell, 40 *id.*, 51 (a person not a party or interested is a competent witness as to a transaction with deceased). *New York:* Porter v. Dunn, 131 N. Y., 314; s. c. 30 Northwest. Rep., 122 (in an action by a husband suing the representatives of deceased for the loss of his wife's services, the wife is a competent witness); Kelsey v. Cooley, 58 Hun, 601; s. c. 11 N. Y. Supp., 745 (a party is a competent witness when not examined in his own behalf); s. p. Davis v. Gallagher, 55 Hun, 593; s. c. 9 N. Y. Supp., 11; Gennerich v. Ulrich, 12 N. Y. Supp., 353 (in partition of the property of a deceased person, the executor of a mortgagee set up a mortgage on the widow's interest. *Held*, that the executor was a party interested and could not testify as to conversations with the deceased husband to show his knowledge of the mortgage); Pandjiris v. McQueen, 37 State Rep., 602; s. c. 13 N. Y. Supp., 705 (where separate claims of a physician and a nurse, presented against decedent's estate, were referred to the same referee. *Held*, that the nurse was competent to testify for the physician); Wilcox v. Corwin, 117 N. Y., 500; s. c. 23 Northeast. Rep., 165 (in an action on a joint note

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against the surviving maker and executor of deceased maker, the survivor cannot testify as to transaction with the deceased to show his liability); *Conner v. N. Y. City*, 19 N. Y. Supp., 85 (in action against a city to recover the salary of plaintiff's intestate, as assistant engineer, the chief engineer may testify as to intestate's discharge); *Godine v. Kidd*, 19 N. Y. Supp., 335 (in an action to enforce an agreement to leave property to an adopted child, the natural mother, who made the contract with deceased for the child's benefit, may testify as to the transaction in her child's behalf); *Rice v. Daly*, 20 *id.*, 941 (in an action on a bond and mortgage plaintiff cannot testify in support of them as to a transaction with the deceased mortgagee under whom defendant claims); *Eighme v. Taylor*, 68 Hun, 573; s. c. 23 N. Y. Supp., 248 (a party though he acquired his interest in the subject matter of the action after the conversation with deceased which he seeks to prove is an incompetent witness as to what was said); *Matter of Gagan*, 20 *id.*, 426 (an executor is not a party in interest to a proceeding for the probate of the will); *Matter of Bedlaw*, 67 Hun, 408; s. c. 22 N. Y. Supp., 290 (parties resisting a testamentary disposition are not competent to show that the facts stated by the testator as the reason for the gift were untrue). *North Carolina*: *Bunn v. Todd*, 107 N. C., 266 (a person not a party or interested is a competent witness as to transactions with a deceased person). *Pennsylvania*: *Arrott, etc., Mills Co. v. Way Manuf'g. Co.*, 143 Pa. St., 485; s. c. 22 Atlantic Rep., 699 (to show the terms of an oral lease from a deceased person in an action for rent by his successor, as member of a limited company, defendant cannot testify as to conversation with deceased); *South Carolina*: *Wood v. Wood*, 25 S. C., 600 (in contest between two claimants under a deceased obligee in a bond, the obligor, though a party, is not interested and may testify as to a conversation between himself and the deceased obligee). *United States*: *Snyder v. Fiedler*, 139 U. S., 478 (when plaintiff, an administratrix, resigns, pending the action, and an administrator *de bonis non* is appointed and allowed to prosecute in her place; she ceases to be a party and becomes a competent witness); *Kingsbury v. Buckner*, 134 U. S., 650 (a husband, who joins his wife in a cross bill to enforce a trust for her benefit alone against decedent's estate is not an "adverse party" under Ill. Pub. L., 1867, p. 183, § 2). *West Virginia*: *Quarrier v. Quarrier*, 1892, 15 Southwest. Rep., 154 (one, who is apparently a first indorser, cannot testify against the estate of deceased second indorser to show that the latter became bound as joint guarantor or promisor with the maker); *Patterson v. Martin*, 33 W. Va., 494; s. c. 10 Southwest. Rep., 817 (party, though having no interest in the result is incompetent). *Wisconsin*: *Hanf v. Northwestern, etc. Ass'n.*, 1890, 43 Northwest. Rep., 315 (agent of party may testify in his behalf as to a transaction with a deceased person); s. p. *Gifford v. Thomas*, 2 b., 1890, 19 Atlantic Rep., 1088.

II. A person interested in the event :

Alabama: *Espella v. Richard*, 1892, 10 Southern Rep., 137 (disinterested witness may testify in behalf of a party as to his transactions with de-

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ceased); *Morris v. Birmingham Nat. Bk.*, 1891, 9 *id.*, 606 (in an action by an indorsee against a deceased indorsee, the maker of the note is not interested, and may testify that the note was made for the deceased's accommodation.) *Illinois*: *Sherret v. Royal Clan*, 37 Ill. App., 446 (in an action against a benefit society, a member liable to assessment not interested); *Bevan v. Atlanta Nat. Bk.*, 39 *id.*, 577 (where decedent's signature to a note is in dispute, holders of the other notes purporting to be signed by him are not disqualified as witnesses). *First Nat. Bk. of Morrison v. Bressler*, 38 *id.*, 499 (in trover by an administrator against a bank for notes of decedent pledged by his son, the payee of the note, though not a party, but who has paid interest to the son, cannot testify as to decedent's declarations to show the son's authority). *Bressler v. Baum*, 42 *id.*, 190 (in an administrator's action to recover the value of notes converted, the maker and others adversely interested to the administrator should not be allowed to testify in behalf of defendant). *Graves v. Safford*, 41 *id.*, 659 (an heir's husband is a competent witness for administrator). *Indiana*: *Sullivan v. Sullivan*, Ind. App., 1893, 32 Northeast. Rep., 1133 (in an action against an administrator or executor, an heir or legatee may testify for defendant). *Iowa*: *Boot and Shoe Manuf'g. Co. v. Seevers*, 1892, 52 Northwest. Rep., 555 (in action for debt, continued against an administrator of one charged as a partner, a member of the firm, though not brought in as a party cannot testify as to the partnership in behalf of plaintiff). *Minnesota*: *Bowers v. Schuler*, 1893, 55 Northwest. Rep., 817 (the interest of witness to disqualify must be a direct and immediate pecuniary interest adverse to the party against whom the testimony is offered). *Missouri*: *Leach v. McFadden*, 1892, 19 Southwest. Rep., 947 (in an action against an executor's sureties, the executor, though not a party, cannot testify in defendant's behalf as to payment to plaintiff's deceased agent). *Fuchs v. Fuchs*, 48 Mo. App., 18 (in action to specifically enforce an agreement to will property, plaintiff's mother who has no interest in the action is a competent witness). *New York*: *Beakes v. Da Cunha*, 126 N. Y., 293; s. c. 27 Northeast. Rep., 251* (in an action upon decedent's guaranty, the person whose debt is guaranteed is not interested). *Bowen v. Sweeney*, 63 Hun, 224; s. c. 22 Civ. Pro. R., 79; 17 N. Y. Supp., 752 (a husband is not disqualified by reason of his right, as tenant by courtesy initiate from testifying in support of a will in which his wife is devisee as to acts of testatrix). *Matter of Lasak*, 131 N. Y., 624; s. c. 30 Northeast. Rep., 112 (where one as legatee would have the income on one-third of the estate for life, but if the will was overthrown would as heir be entitled absolutely to one-fifth of it, *held*, that she was interested in the overthrowing of the will). *Hoffman v. Hoffman*, 18 N. Y. Supp., 387 (in ejectment where defendant claims under oral agreement with plaintiff's deceased vendor, defendant's wife cannot testify as to transaction between deceased and defendant). *Whitman v. Faley*, 125 N. Y., 651; s. c. 26 Northeast. Rep., 725 (in foreclosure the husband of a defendant who acted as wife's agent, is not interested). *Fogal v. Page*, 37 State Rep., 280; s. c. 13 N. Y., Supp., 656 (a husband is not interested in action of wife to recover money

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paid upon purchase of real estate). *Luetchford v. Lord*, 132 N. Y., 465; s. c., 30 Northeast. Rep., 859 (in foreclosure of a mortgage made by husband and wife on the wife's land, the husband is not a competent witness against deceased mortgagee to show that the mortgage was given for his gambling debt, as it would release him from personal liability). *Eisenlord v. Clum*, 126 N. Y., 552; s. c. 27 Northeast. Rep., 1024 (in ejectment by an heir, his mother is a competent witness on the question of his legitimacy to prove her marriage with deceased, since the judgment therein would not be admissible in any action for dower). *Connally v. O'Conner*, 117 N. Y., 9; s. c. 22 Northeast. Rep., 753 (the mother of a bastard is not interested in a suit against the administratrix of the putative father on his alleged contract to support the child). *Korminsky v. Korminsky*, 2 Misc., 138; s. c. 21 N. Y. Supp., 611 (in an action to enforce an agreement by plaintiff's deceased father to will them certain lands, plaintiff's sisters who have deeded over their interest in the lands without consideration may testify as to conversations with their deceased father in relation to the agreement). *Richards v. Crocker*, 20 *id.*, 954 (in an action to recover land, neither defendant, nor his brother to whom the land would descend if plaintiff's deed from their deceased father proves invalid, can testify as to their father's mental and physical condition when he made the deed to plaintiff). *Payne v. Kerr*, 21 *id.*, 800 (an attorney at law may testify as to an oral agreement which he made with a deceased person in behalf of his client). *Pennsylvania*: *Keener v. Zartman*, 144 Pa. St., 179; s. c. 22 Atlantic Rep., 889 (in an action for debt against an administrator, an intestate's son is interested and cannot testify for defendant). *Gerz v. Weber*, 151 Pa. St., 396; s. c. 25 Atlantic Rep., 82 (in an action against an executor a legatee may testify that the claim was paid in testator's lifetime). *Dickson v. McGrau*, 151 Pa. St., 98; s. c. 24 Atlantic Rep., 1043 (where an execution creditor sought to show that a former sale of the property through which defendant claimed was made in fraud of creditors, the original owners have no adverse interest which prevents them from testifying as to a transaction with the first purchaser prior to his death). *Matter of Taylor's Estate*, 154 Pa. St., 183; s. c. 25 Atlantic Rep., 1061 (where a decedent drew a check to a person in order that he might make a payment to another to whom decedent wished to give a sum of money, the payee of the check is not beneficially interested therein and may testify as to decedent's declarations when he drew it). *Fowler v. Smith*, 153 Pa. St., 639; s. c. 25 Atlantic Rep., 744 (in an action by an executrix, the brother of defendant is a competent witness in his behalf in absence of any interest in suit). *Vermont*: *Manley v. Staples*, 1893, 26 Atlantic Rep., 630 (one who has made a contract with another for the latter's support in consideration of property conveyed is a competent witness upon the contest of the probate of the will of the person to be supported which recites that it confirms and approves the contract, and bequeaths to the witness testator's personal property; as the establishment of the will if it can have any effect on the contract, can only do so incidentally and collaterally). *Smith v. Pierce*, 1893 (the person who wrote letters for

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another, since deceased, in which the latter promised the plaintiff to leave him all his property in consideration of support, is a competent witness to show that deceased authorized the letters to be written and sent).

III. *Other recent cases :*

Removal of disqualification by release of interest. *Moore v. Schofield*, 96 Cal., 486; s. c. 31 Pacific Rep., 532 (in an action against co-contractors, where one dies pending the action, and the action is renewed against his administrator, the surviving contractor, though a judgment has been rendered against him by default, is not a competent witness for the plaintiff); *La Prad v. Sherwood*, Mich., 1890, 44 Northwest. Rep., 943 (in suit to set aside a mortgage for agent's fraud, agent cannot be dismissed from the case by the filing of a disclaimer so as to enable him to testify as to a transaction with deceased); *Fink v. Hey*, 42 Mo. App., 295 (in an action by an unincorporated society, upon a bond of a deceased person, members of the society at the time of its execution, but not at the time of trial, are competent to testify as to the bond's execution by deceased, otherwise as to those who continued to be members); *Ehmann v. Scheuerman*, N. Y. 14, Daly, 411 (in an action against a surety the principal in whose favor the statute of limitations has run, is not interested in the event); *O'Brien v. Weiler*, 68 Hun, 64; s. c. 22 N. Y. Supp., 637 (in an action to recover a debt due the estate of testator, a legatee who relinquishes her interest in the fund in controversy without releasing her interest in the rest of the estate becomes a competent witness for plaintiff); *Keener v. Zartmann*, 144 Pa. St., 179; s. c. 22 Atlantic Rep., 889 (where a claim is made against deceased father's estate, a son who has received real property from the father which may be liable for his debts, is disqualified, though the son has assigned his interest in his father's estate); *Hutchinson v. Brown*, 19 D. C., 136 (in an action by an executrix on a joint or joint and several promise, one defendant cannot, by confessing judgment without plaintiff's consent, make himself competent to testify on behalf of his co-defendant); *Turnstall v. Withers*, Va., 1890, 11 Southeast. Rep., 565 (in a suit to enforce vendor's lien, vendee is incompetent, though the claim against him was barred by limitation, and his interest in the suit was only as to costs).

IV. *Objection, how raised :*

McHugh v. O'Dowd, Mich., 1891, 49 Northwest. Rep., 216 (material evidence by a claimant against a decedent's estate, which was equally within decedent's knowledge, should not be received, though the administrator does not object); *Perine v. Grand Lodge, etc.*, Minn., 1892, 50 Northwest. Rep., 1022 (the burden is on the party objecting to show witness' interest, and if it is not shown sufficiently he may testify); *Reynolds v. Reynolds*, 45 Mo. App., 622 (where surviving party to a contract is offered as a witness concerning it, he must bring himself within some exception to the statutory rule, and offer to contradict assertions he is said to have made is too general); *Norris v. Stewart*, 105 N. C., 455; s. c. 10 Southeast. Rep., 912 (a general objection that the witness is interested is not sufficient).

Peters v. Peters, 3 Delehanty, 264.

PETERS v. PETERS.

New York Court of Common Pleas, 1893.

[Reported in 3 Delehanty, 264.]

A receiptor to a public officer for money found on the person of a lunatic, under a promise to apply it to the lunatic's use, is a person deriving his title to the fund "from, through or under" the lunatic, within the meaning of N. Y. Code Civ. Pro., § 829, so as to render testimony of an interested witness incompetent.

If insanity is alleged, and is not contested on the trial, evidence of its actual continuance at the time of the trial is not essential to justify exclusion.

Plaintiffs sued defendant to recover certain money delivered to defendant by the commissioners of charities, upon his alleged express agreement to keep the money for the benefit of his mother, Mrs. Peters, in whose possession the money was found, when she was committed to the City Asylum for the Insane, as of unsound mind.

At the trial, plaintiffs, who were respectively the husband and two others of the children of Mrs. Peters, adduced evidence showing that all the children, except defendant, had originally deposited money with Mrs. Peters for her and their benefit.

Plaintiffs were allowed to testify against objection to personal transactions with their mother.

Judgment was entered for plaintiffs, upon a verdict of a jury.

The Court of Common Pleas at General Term reversed the Judgment.

DALY, Ch. J. [*after stating the facts said*]: He [defendant] received the fund from the bailees of his mother, and can defend in her right. As she was insane when committed to Blackwell's Island, she could not make a valid agreement of bailment, but the commissioners of charities and corrections, as public officers, coming into possession of the fund as custodians of her person and of the property found upon it, have all the obligations of bailees, and the defendant, Stephen stands in a position somewhat resembling that of a receiptor, and is entitled to the same

defenses against claimants of the fund as are available to the public officers from whom he received it. (Edwards' Bailments, title "Receiptors.")

His title to the money is derived by, or through or from his mother, an insane person, and the evidence of the plaintiffs as to personal transactions with her should not have been received against him. (Code, § 829.) For this error alone the judgment would have to be reversed.

It is urged by the plaintiffs that there was no proof that the mother was insane at time of the trial. The complaint expressly alleged that she was committed to the City Asylum for the Insane on Blackwell's Island, being of unsound mind and so far deprived of her reason and understanding as to be altogether unfit and unable to govern herself or to manage her affairs and that at that time the money in question was found in her possession. A derangement of mind proved or admitted to exist at any particular period is presumed to continue until disproved, unless the derangement was accidental, being caused with the violence of a disease. (1 Greenl. Ev., 42.) But there was no question of her insanity at the time of the trial. It seemed to be conceded on all sides, and the only apparent reason why the evidence of transactions with her was admitted against the defendant, was that he did not have any right or title to the money and therefore could not derive his interest or title from or through her.

It would seem that the proper course for plaintiffs to pursue would be to have a new trustee of the fund appointed, in place of the mother, who has become incapacitated from acting; but, without discussing this question further, it is enough to say that upon the proofs, and for the errors appearing in the record, this judgment cannot possibly be sustained.

Bischoff and Pryor, JJ., concurred.

Judgment reversed, and a new trial ordered, with costs to appellant to abide the event.

Pope v. Allen, 90 N. Y., 298.

POPE v. ALLEN.

New York Court of Appeals, 1882.

[Reported in 90 N. Y., 298.]

The prohibition of N. Y. Code Civ. Pro., § 829, is not limited to the particular decedent from whom the adverse party directly took his title, but extends to any decedent from whom the adverse party took his title, though through one or more *mesne* conveyances.

Ejectment in which plaintiff sought to recover as the grantee of one Nathaniel B. Pope. He proved his deed from said Pope to himself and also that at the time he took such deed there was a deed on record to said Pope, from one Rogers who was the common source of title.

Defendant claimed that he had all that time been in possession. That said Pope was his agent to purchase the premises for him from Rogers, and did so with defendant's money; and fraudulently took the deed to himself instead of to defendant, so that a trust resulted for defendant.

Upon the trial, Nathaniel B. Pope and Jonathan Rogers both having died, defendant was called as a witness in his own behalf and asked: "Did you at any time make a bargain with Rogers in regard to the purchase of the twenty-five acres of him?"

Objected to as incompetent, irrelevant and immaterial under N. Y. Code Civ. Pro., § 829, Rogers being dead; objection sustained and exception taken. Judgment for plaintiff.

The Supreme Court at General Term affirmed the judgment without opinion.

The Court of Appeals affirmed the judgment.

FINCH, J. [*after stating facts*]: Under the language of the old code there was authority for this doctrine. (§ 399; *Prouty v. Eaton*, 41 Barb., 409; *Cary v. White*, 59 N. Y., 336.) We need not consider these cases, since the language upon which they were founded had been materially changed in the later revision. The former prohibition excluded the party's evidence as to "any personal transaction or communication between such witness and a person at the time of such examination deceased.

* * * against the executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, or survivor of *such* deceased person." It was possible to construe this language as limiting the prohibition to the particular deceased person from whom directly the adverse party took his title. Whether even that construction was sound might not be beyond debate, but the essential change in the language, at all events, requires us to adopt a different construction.

The language now is "against the executor, administrator or survivor of a deceased person, * * * or a *person* deriving his title or interest from, through or under a deceased person, * * * concerning a personal transaction between the witness and the deceased person" (§ 829). The specific modes of succession named in detail in the old code are represented in the revision by a general and broader phrase. "The deceased person," referred to in the latter, is one "from" whom, or "through" whom, the adverse party derives his title, or "under" whom he holds. The plaintiff here derived his title "from" Jonathan Rogers, "through" N. B. Pope, and held "under" the former as well as the latter. The language covers the case, and we can see no just reason which excludes personal transactions with N. B. Pope, which does not also apply to Rogers, "under" whom both parties claimed title.

NOTE.—In *Cary v. White*, 59 N. Y., 336 (foreclosure), defendant Jane White claimed under unrecorded deeds dated prior to the mortgage. One Foster was the attorney employed by the deceased grantor and mortgagor to draw the mortgage. Upon the trial the court refused to allow the mortgagee plaintiff to testify to a conversation between the mortgagor and Foster.—*Held*, not error. (1.) A third person can testify to what he heard pass between attorney and client. (2.) A general objection is not enough. JOHNSON, J. [*after stating facts, says*]: The proposed evidence was objected to by the defendant on the ground that under section 399 of the Code plaintiff could not be permitted to make the proof. Taking the objection in the form most favorable to the objecting party, it may be said to specify two grounds of objection, the one that Foster was the attorney who drew the papers; the other, that the plaintiff was a participant in the conversation. In respect to the first ground, its materiality is not perceived. If Foster be regarded as counsel for White and the conversation as relating to a consultation between them, as to which Foster could not be compelled to testify, there is no rule of law forbidding the proof of what passes between attorney or counsel and

client, if it can be proved without violating the immunity from examination which attaches to the attorney or counsel. A third person may prove, if he can, what a party says to his counsel, as well as his declarations to any other person, when they are material. Nor does section 399 of the Code alter the matter. That relates only to a personal transaction or communication between the witness and the deceased. Foster being White's counsel does not transform what is said between them into a personal transaction or communication between White and the plaintiff. Nor would the fact that the plaintiff participated in the conversation alter the matter, so long as what is proposed to be proved is limited to what was neither personal transaction nor communication between the witness and deceased. The fact that another person is competent to speak goes far to take the case out of the substantial reason of the statute, and it does not fall within its letter. It is neither personal transaction nor communication between the witness and the party deceased, and these alone cannot be proved by the testimony of a party. Under the existing laws, the rule is that a party is competent as a witness. His exclusion is to be made out by the party alleging his incompetency as to any particular matter. *Simmons v. Sisson* (26 N. Y., 277) and *Lobdell v. Lobdell* (6 *id.*, 333, 334), sustain the views above expressed. It must, we think, be regarded as settled, under the present provision of the Code, that the three hundred and ninety-ninth section does not preclude a party from testifying to the statements of a person deceased, made to a third person in the hearing of the witness.*

It is suggested that the declarations of White were not, as mere declarations, admissible in evidence against the defendant Jane White. To this we are compelled to answer that neither the objection nor the exclusion of the proposed evidence was put upon that ground, but distinctly upon the force of the three hundred and ninety-ninth section. If that objection had been made, as it was possible by evidence to have supplied the defect and shown that, under the real circumstances of the case, the title of the defendant, Jane White, was properly to be affected by the facts, in proof of which the declarations were offered, we must assume that such evidence would have been produced.

NOTE.—In *Conway v. Moulton*, 6 Hun, 650, the defendants had hired tools of the plaintiff's father, supposing them to be his and in ignorance of their prior sale by him to the plaintiff.—*Held*, in an action to recover their value, and in which one of the defendants died before trial, that the father was precluded by Code Pro., § 399, from testifying that he made demand for the tools upon the deceased defendant.

* On this point later cases have made the rule much more stringent. See p. 202 of this vol.

NOTE ON RECENT CASES.—WHO MAY OBJECT AS REPRESENTATIVE OF DECEASED OR AS ONE CLAIMING UNDER HIM.

Alabama : *Warten v. Strone*, 82 Ala., 311 ; 8 Southern Rep., 231 (under Code Ala., 1876, § 3058, a party cannot testify against principal as to transactions with his deceased agent); s. p. *Downing v. Woodstock Iron Co.*, Ala., 1891, 9 Southern Rep., 117. *California* : *Shaw v. Forbes*, 82 Cal., 577 ; s. c. 23 Pacific Rep., 198 (in action for services jointly against two defendants, one of whom has since died, though plaintiff's testimony as to value of his services is incompetent against deceased's executors, it should be admitted against the surviving defendant, if a several judgment may be entered against him). *Georgia* : *Johnson v. Champion*, 88 Ga., 527 ; 15 Southeast. Rep., 15 (a wife of one dying without descendants, who is authorized to take possession of deceased's estate without letters, is a personal representative of decedent, and a creditor of deceased cannot testify against her as to personal transactions with deceased); *Mayfield v. Savannah, etc. R. R. Co.*, Ga., 1891, 13 Southeast. Rep., 459 (under Ga. Act, Oct. 29, 1889, in suit against a corporation, the opposite party cannot testify as to a transaction had solely with a deceased officer or agent of the corporation); but otherwise where other surviving officers were present, *Lytle v. Chicago, etc. Ry. Co.*, 84 Mich., 289, 47 Northwest. Rep., 571 (under a similar statute, Mich. How. Stat., § 7545). *Illinois* : *People v. Borders*, 31 Ill. App., 426, (in an action against a deceased guardian's sureties, the ward may testify that he had not been paid by deceased); *Esterly Harvesting Co. v. Hill*, 36 Ill. App., 99 (in an action against an administrator personally defendant cannot raise the objection, the estate leaving no interest); *Johnson v. Johnson*, Ill., 1891, 27 Northeast. Rep., 930 (in an action against a sole heir to establish verbal agreement, by which decedent promised to hold certain lands for plaintiff, plaintiff is an incompetent witness as to the agreement). *Indiana* : *Larch v. Goodacre*, 126 Ind., 224 (in an action by decedent's creditors charging his widow with conversion of his estate, the widow is "heir" within Ind. R. S., 1881, § 499, though complaint alleges her to be administratrix *de son tort*, and defendant cannot testify as to transaction had with decedent); *Hess v. Lowery*, 122 Ind., 235 ; s. c. 23 Northeast. Rep., 156 (in an action against two physicians as partners for malpractice, one having died pending the suit, plaintiff can testify as to declarations made by the deceased partner while performing the operation); *Reddick v. Keesling*, 129 Ind., 128 ; s. c. 28 Northeast. Rep., 316 (where daughter sues father to recover money left with him in trust for plaintiff by her deceased mother, the father cannot testify in his own behalf as to the trust agreement). *Iowa* : *French v. French*, Iowa, 1892, 51 Northwest. Rep., 145 (widow who has taken unauthorized possession of decedent's estate may take advantage of the rule as one of the next of kin); *Bellows v.*

 Note on Who May Object.

Litchfield, Iowa, 1891, 48 Northwest. Rep., 1062 (vendee is a competent witness as to transactions with vendor's deceased agent); s. p. Reynolds v. Iowa, etc. Insurance Co., 80 Ia., 563; s. c. 43 Northwest. Rep., 659). *Kentucky*: Alexander v. Alford, 89 Ky., 105; s. c. 20 Southwest. Rep., 164, (in an action by surety of a removed guardian against the surviving members of a partnership, to recover a loan of estate's money made by the guardian, notwithstanding his removal, the guardian cannot testify that the deceased partner knew the money belonged to the ward); Hurry v. Kline, 1893, 20 Southwest. Rep., 277 (though an indorsee has lost his right of recourse against the estate of the deceased payee, the maker of the note cannot testify as to what took place between him and the payee). *Missouri*: Aultman v. Adams, 35 Mo. App., 503 (under Mo. Stat. in an action by a corporation defendant cannot testify as to what took place between him and plaintiff's deceased agent). *Nevada*: Gage v. Phillips, Nev., 1891, 26 Pacific Rep., 60 (in foreclosure by a surviving partner defendant cannot testify that the deceased partner by verbal agreement accepted property in satisfaction of the mortgage). *New Hampshire*: Clark v. Clough, 65 N. H., 43; s. c. 23 Atlantic Rep., 526 (executor or administrator includes all persons holding decedent's estate in an official representative capacity). *New Jersey*: Joss v. Mohr, 1893, 26 Southern Rep., 987 (devises are representatives of deceased). *New York*: Curnan v. Delaware, etc. R. R. Co., 17 N. Y. Supp., 714 (in an action against a corporation upon a contract to build, plaintiff may testify as to conversations with a deceased person, who supplied defendant with money); Mason v. Pendergast, 120 N. Y., 536; s. c. 24 Northeast. Rep., 806 (decedent gave money to C. for plaintiff; C wrongfully gave it to the defendant; held, that C. might testify in behalf of plaintiff as to transactions with deceased, since defendant did not derive title from him, but that defendant was disqualified from giving like testimony as plaintiff claimed under deceased); Miller v. Davis, 14 N. Y. Supp., 725 (in action by administrator to set aside decedent's deed as in fraud of creditors, defendants may testify as to conversations with decedent, since the administrator represents the creditors and not the estate); Matter of Dunham, 121 N. Y., 575; s. c. 24 Northeast. Rep., 932, (one who is both heir and legatee cannot testify as to testator's mental unsoundness against one who is a legatee for a relatively larger amount). *North Carolina*: Roberts v. Richmond, etc. R. R. Co., 109 N. C., 670; s. c. 14 Southeast. Rep., 106 (plaintiff may testify as to contract with defendant's deceased agent). *Pennsylvania*: Walton v. Hinnan, Pa., 1892, 23 Atlantic Rep., 342 (*cestui que trust* cannot testify against one claiming under deceased trustee); Jackson v. Lewis, s. c. 10 Southeast. Rep., 1074, (in an action by deceased's creditors to set aside a fraudulent conveyance, the grantee may testify as to conversations with deceased); Young v. Searft, 153 Pa. St., 352 (a wife may testify that her deceased husband purchased property in his own name with her money in ejectment by a purchaser at an execution sale of the property as the husband's). *Texas*: Mitchell v. Mitchell, Tex., 1891, 15 Southwest. Rep., 705 (the heir is not a "legal representative" within Tex. R. S., Art. 2248); Curtis v. Wilson,

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Tex. Civ. App., 1893, 21 Southwest. Rep., 787 (a legatee is not). *Washington* : Smith *v.* Taylor, 2 Wash. St., 422 ; s. c. 27 Pacific Rep., 812 (in ejectment by one claiming to be the equitable owner of land in name of deceased, defendant, a tenant of deceased, cannot testify as to his agreement with deceased). *Wisconsin* : Nau *v.* Brunette, Wis., 1891, 48 Northwest. Rep., 649 (in ejectment by persons claiming under deceased mortgagee, the mortgagor cannot testify as to payment to the mortgagee before the latter assigned the mortgage).

Note on Release to terminate Interest.

NOTE ON RELEASE OF INTEREST AT COMMON LAW.

The cases above given show the effect of a release *by* a witness having an interest.

At common law a release by the party *to* a witness to terminate his liability was good.

In a Mechanic's Lien case, where, under the statute, the mechanic sued the owner to recover, on the theory that there was a fund in the owner's hands due to the contractor, which plaintiff had a right under the statute to reach; *held*, that the contractor having full notice of the suit, and therefore liable to be bound by the judgment, was incompetent by reason of interest. (*Hoyt v. Miner*, 7 Hill, 525; affg. 4 *id.*, 193.)

But further *held*, that the plaintiff could release the contractor at the trial, after objection made that he was interested, and thus render him competent; but the judges were not agreed whether such release would not necessarily bar the plaintiff's action if it were pleaded by the defendant because (COWEN, J.) "plaintiff's demand against the defendant was no more than a collateral security for his demand against the contractor," and the latter being the principal, his release might release the one in the position of surety.

The release in terms contained a clause which declared it to be understood that the release should not operate to prejudice the plaintiff's claim in the suit.

LOTT, *Senator*, delivering the opinion of the Court of Errors upon affirmation of the judgment, against an exception to the admission of the contractor's testimony, said: "The testimony of D. Hoyt (the contractor) was in my opinion properly admitted. After the release, he certainly was not interested in favor of the plaintiff. He was discharged from all liability for the amount, and a recovery by the plaintiff would be of no advantage to him. The learned judge who delivered the opinion of the Supreme Court, however, appears to consider that he was still incompetent, on the ground that 'the effect of his failure to show a fund adequate to the payment of his demand, would be to bar the witness *pro tanto* in any suit he might afterwards bring in his own name for the same funds.' If that be conceded, it is equally true that, if a fund adequate to the payment is shown, he would then be barred from the recovery of it.

"It is contended, however, that the effect of the release to D. Hoyt was to discharge all claims on the defendant. I think not. The plaintiff, on the non-payment of the amount due him, as adjusted and ascertained, had a right to the fund, which could be enforced by action against the owner. Besides, the release in terms reserves his right to recover the claim against Miner, and declares that it shall not prejudice the claim, but only release the witness from all personal liability. It is manifest, therefore, that it was not intended to operate as a release of the defendant, and it will be

Note on Release to terminate Interest.

construed according to the intent of the parties." (Citing *Stewart v. Eden*, 2 Caines' Rep., 121 ; *Lyman v. Clark*, 9 Mass. Rep., 235.)

S. p. *Starkweather v. Mathews*, 2 Hill, 131, where it was held that in an action on a promissory note by the holder against an endorser, the maker of the note may be rendered a competent witness for the defendant endorser, upon the latter's releasing him from liability over for the costs and charges of the suit. The maker's interest then is balanced.

So, in *Seymour v. Strong*, 4 Hill, 255, involving similar facts, it was also held that there must be more than a constructive delivery of the release, but that the rule is satisfied if it appear that the witness, examined on a commission, knew of the release at the time of giving his testimony.

In *Tobey v. Leonards*, 2 Wall. (U. S.), 423, in delivering the opinion of the court, WAYNE, J., says, that it is lawful for a person to sell out all his interest in property about to be the subject of a suit, to his son, to enable himself to be a witness upon the trial of the cause (citing *Babcock v. Wyman*, 19 How. [U. S.], 289), even though the sale was made to a party who had no previous interest.

But such a witness would be incompetent under the N. Y. statute which extends its prohibition to a person from, through or under whom the interested party or person claims.

Holcomb v. Holcomb, 95 N. Y., 316.

HOLCOMB v. HOLCOMB.

New York Court of Appeals, 1884.

[Reported in 95 N. Y., 316.]

In an action by an administrator to set aside an assignment by his intestate on the ground of want of mental capacity and undue influence, —*Held*, that the next of kin were disqualified from testifying on behalf of the administrator to personal transactions with intestate.

“Transactions” and “communications,” in the statute, embrace every variety of affairs which can form the subject of negotiations, interviews, or actions, between two persons; and include every method by which one person can derive impressions or information from the conduct, condition or language of another.

Although it must appear that the interview or transaction sought to be excluded was a personal one, it need not have been private or confined to the witness and deceased. If they participated, it does not change its character because others were present.

The policy of the statute excludes the evidence of an interested witness concerning: 1st, Any transaction between himself and a deceased person, or in which the witness in any manner participated; 2d, All communications in the presence or hearing of the witness, if he in any way was a party thereto, or communications to either one of two or more persons, if all were interested.

Hence, an interested witness cannot testify to the demeanor, the physical weakness and the appearance of feebleness of intelligence of the deceased, even though when these were observed he said nothing to the witness.

Action to set aside an assignment, by Homer Holcomb, plaintiff's intestate, of a bond and mortgage, on the ground that he was of unsound mind and subjected to undue influence at the time he made the assignment.

On the trial many members of deceased's family, entitled to share in the fund which a recovery by plaintiff would create or increase were called by plaintiff and testified to deceased's transactions and conversations. Several instances appear at length in the opinion.

Griswold and Crowell, for plaintiff.

King and Hallock, for defendant.

The Supreme Court at Special Term gave judgment for plaintiff.

The General Term affirmed the judgment.

Holcomb v. Holcomb, 95 N. Y., 316.

BOARDMAN, J. [*referring to exception to the admission of the evidence, said*]: Nearly all the exceptions may be grouped under this head.

Were the next of kin of Homer Holcomb, the deceased, competent witnesses to prove the declarations of the deceased in their presence but not to them, and the acts and condition of their father as seen by them?

This class of exceptions was disposed of at the former appeal (20 Hnn, 156), where it was held that such testimony did not constitute personal transactions between the witness and the deceased such as are prohibited by N. Y. Code Civ. Pro., § 829. The authorities cited, abundantly sustain the position. (*Simmons v. Sisson*, 26 N. Y., 264, 277; *Cary v. White*, 59 N. Y., 336; *Franklin v. Pinckney*, 18 Abb., 186).

The Court of Appeals reversed the judgment.

DANFORTH, J. [*on the point in question, said*]: There was also error in disregarding the prohibition of the statute (Code, § 829), as to evidence of personal transactions and communications between certain persons and the deceased. (1.) They were interested in the event of the action, because a recovery would create or increase a fund, in the distribution of which they would share. The defendant derived his title by assignment from the deceased person, and that title is the particular claim sought to be affected by their testimony. It should be borne in mind that its validity depends upon the mental condition of the assignor when it was executed. The words of exclusion are as comprehensive as language can express: Transactions and communications embrace every variety of affairs which can form the subject of negotiation, interviews, or actions between two persons, and include every method by which one person can derive impressions or information from the conduct, condition, or language of another. The statute is a beneficial one and ought not to be limited or narrowed by construction. Although it must appear that the interview or transaction sought to be excluded was a personal one, it need not have been private or confined to the witness and deceased. If they participated, it does not change its character because others were present. A contrary rule

would defeat the reasonable intent of the statute that a surviving party should be excluded, as one interested, from maintaining by his testimony an issue which in any degree involved a communication or transaction between himself and a deceased person. On the other hand such a party may testify to an independent fact, as was held in *Pinney v. Orth* (82 N. Y., 619), where a survivor was thought competent to contradict a statement made by a third party as to his presence at an alleged interview between himself and the deceased. So also a distinction is taken between a communication exclusively between others, which the witness overheard, and one in which he himself took part, either actually, or by acquiescence. (*Simmons v. Sisson*, 26 N. Y., 264; *Lobdell v. Lobdell*, 36 *id.*, 327; *Cary v. White*, 59 *id.*, 336; *Pinney v. Orth*, *supra*; *Brague v. Lord*, 2 Abb. N. C., 1.) In the case of *Cary v. White*, the court regard it as settled that the provisions of the Code (§ 399), there under consideration, and which were not unlike those now in force (§ 829), do not preclude a party from testifying to the statement of a person deceased, made to a third person in the hearing of a witness. Such a case was said not to fall within the letter of the statute, and the fact that another person is competent to speak as to what occurred, is referred to as going far to take it out of the substantial reason of the statute.

It is obvious that a proper regard to the rights of suitors in the administration of justice requires the conditions upon which this conclusion depends to be strictly observed. The policy of the statute excludes the evidence of an interested witness concerning, 1st: Any transaction between himself and a deceased person, or in which the witness in any manner participated; 2d: all communications between the person deceased and the witness, including communications in the presence or hearing of the witness, if he in any way was a party thereto, or communications to either one or two or more persons, if all were interested.

Each of these species of testimony is as much opposed to the spirit and intent of the statute as the other. If the proposed witness has asked a question of the decedent, and it is answered, it is a conversation; if while the decedent is conversing with a

third person the witness by word or sign participates in it, or is referred to, his evidence of what occurred cannot be received. Within this rule the following evidence was improperly received: Abel G. Holcomb, a son of the deceased assignor, was asked, "Do you know anything about his (the deceased's) having a spasm, or fits, or anything; what do you know about it; what did you ever observe?" The attention of the court had been called to the relationship between the witness and the grantor, and the objection was distinctly placed on section 829. He answered: "I remember once I was up there, he had one of those spells, I led him out to make water. I noticed when he straightened up, I had to catch him from falling back. I had to hold him and lead him back into the house." This evidence was to show the assignor's enfeebled and dependent condition, the very point in the case. Again: on the day in question, when the assignment was executed, this witness and his brother Norman were alone with the assignor. They were each allowed to give evidence as to what they saw of him at that time—his appearance and that he did not speak to either;—by this witness that he did not open his mouth while Norman was there, and by Norman substantially the same thing. Each testified to a mental and bodily condition of the assignor, as indicated by conduct which they observed and by his absolute inattention to them and their remarks, entirely incompatible with the possession of understanding, or the ability to comprehend the nature of the act—that of acknowledging the assignment, which he, that day, is said to have performed. Sherwood Holcomb, another son, after objection under section 829 of the Code, as if to obviate its force, was asked, "State what you heard your father saying or doing, or what you heard your father say when it was not addressed to you."

"A. I have often heard him talking to himself and carrying on conversations the same as though he was talking to somebody, and there was nobody in the house, that was in the room he occupied. I listened to hear what he was saying.

Q. What was it?

Objected to by defendant's counsel, on the ground that it is incompetent and immaterial; also that it is a personal communi-

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cation by Homer Holcomb to the witness and is excluded by section 829 of the Code.

Objection overruled and defendant excepted."

In this instance the witness prepared himself to hear what his father might say. His testimony is not made admissible because his father did not solicit the interview, and was even ignorant of his presence. The words, when spoken, became a communication which he received. It was then a communication to him. He answered, "I heard him talking in his bedroom. He would be talking to my mother, even asking her to come back." (She was not then living.) "I heard him a number of times."

The inquiry is pursued.

"Q. What about his memory in the spring of 1869?

A. I thought he was very forgetful.

Q. What made you think so?

A. He would ask me questions, and may be ten or fifteen or twenty questions. He would ask me over again. In a little while he would ask me again the same thing."

Thomas B. Holcomb, the plaintiff, who is also a son of the assignor, said:

"I recollect of meeting my father on the road just below Big Hollow, within two or three years of his death. I was in a wagon and he on foot, walking. I saw him ahead; he was tottering along feebly. I stopped my horse and spoke to him and he kind of stared at me.

Defendant's counsel moved to strike out the words "he stared at me," on the ground that it is a personal communication and excluded by section 829 of the Code. Motion denied, and defendant excepted.

Q. What was the expression of his eyes and countenance?

Objected to by defendant's counsel on same grounds as last above stated. Objection overruled and the defendant excepted.

A. I don't think he knew me.

Q. Would you think that his countenance did not indicate recognition?

Objected to by defendant's counsel on same grounds as last above stated. Objection overruled and the defendant excepted.

A. Yes, sir.

Q. Did he speak to you?

Objected to by defendant's counsel on same grounds as last above stated. Objection overruled and the defendant excepted.

A. I think not. I got off the wagon.

Q. What did he do after you took hold of him?

A. He did not move away. I took him in my arms.

Defendant's counsel objected to what witness did.

Court: He may answer it. Exception by defendant.

A. I took him in my arms and set him in my wagon. I went with him up to Lyman Payne's. In former days father's weight was from one hundred and sixty to one hundred and seventy-five pounds.

Q. What was his weight then?

Objected to by defendant's counsel on same grounds as last above stated. Objection overruled and defendant excepted.

A. I should think not over seventy-five pounds—the lightest man I ever lifted.

Q. Judging from what you heard him say then and afterward at Payne's, how would you characterize his appearance?

Objected to by defendant's counsel on the same grounds last above stated. Objection overruled and defendant excepted.

A. He appeared almost exhausted, mentally and physically—imbecile."

None of this evidence can be justified. There was more of the same character. In some instances we see a plain and unmistakable personal communication and a personal transaction, and in all, such participation as brings the witness within the reason and policy of the prohibition imposed by statute.

It is contended by the learned counsel for the respondent that the errors should be disregarded as not affecting the result. But this we cannot say. On the other hand it seems that injustice may have resulted from the evidence adverted to, and in such a case, whether the action is for equitable or legal relief, the appeal of the aggrieved party should prevail.

The judgment appealed from, should, therefore, be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

Matter of Eysaman, 113 N. Y., 62.

MATTER OF EYSAMAN.

New York Court of Appeals, 1889.

[Reported in 113 N. Y., 62.]

In a contest over the probate of a will, on the question of testamentary capacity, an interested witness is incompetent, under the statute, to testify as to his observations of the acts and conduct of the deceased. Such witness is also incompetent to testify as to conversations between the deceased and third persons in his presence, even though he took no part therein.

It appearing from previous evidence that such witness was present and assisted the deceased during the execution of the will, he is incompetent to testify as to the publication and attestation thereof, although he took no part.

The act of executing a will, although consisting of several incidents, constitutes but one continuing transaction; a participation by a person in any of the material acts required to complete its valid execution makes the transaction one between the testator and such person.

An application for the probate of the will of Henry P. Eysaman, contested by the heirs and next of kin on the ground of undue influence.

Upon the trial, Ware, the principal devisee under the will and who had been the testator's attendant during sickness, was called as a witness for the proponents to testify to the acts, conduct and conversations of the testator during the last week of his sickness; and was asked by proponent's counsel: "Did you hear any conversations or conversation between Henry P. Eysaman and any other person on Sunday immediately previous to his death in which you did not engage?" Objected to, as incompetent under N. Y. Code Civ. Pro., § 829. Admitted and exception to contestants.

Evidence of this kind was then uniformly objected to, except in one instance, by the contestants, upon the specific ground that Ware, as a legatee under the will, was not competent to testify to personal transactions and communications with the testator under N. Y. Code Civ. Pro., § 829.

The objections were uniformly overruled and Ware gave abundant evidence of the condition of the testator during the last week of his life.

Smith & Steel, for defendant.

Mills, Palmer & Morgan, for plaintiff.

John D. Henderson, for executors.

The *Surrogate* admitted the will to probate.

The Supreme Court at General Term affirmed the decree.

FOLLETT, J. [*dissenting, said*]: When the probate of a will is contested upon the ground that at the time of its execution, the testator was without sufficient mental capacity to understand the nature of the act in which he is engaged, a legatee who assists in its execution by the request of the testator, is *incompetent* to testify in support of the will, to acts or declarations of the testator observed or heard by the legatee during the transaction. (N. Y. Code Civ. Pro., § 829; *Holcomb v. Holcomb*, 95 N. Y., 316; *Lane v. Lane*, *id.*, 494; *Hatter v. Smith*, *id.*, 516; *Schoonmaker v. Wolford*, 20 Hun, 166; *Cadmus v. Oakley*, 3 Denio, 324.)

The Court of Appeals reversed the judgment.

RUGER, Ch. J. [*after stating the facts*]: Ware, who was the principal devisee under the will, and had been in the testator's employ for upwards of forty years, and his constant attendant during his last sickness, was called as a witness in support of the will. He was permitted to testify to his observations of the acts, conduct and conversations of the testator during the last week of the testator's sickness. This evidence was uniformly objected to, except in one instance, by the contestants, upon the specific ground that Ware, as a legatee under the will, was not competent to testify to personal communications and transactions with the testator, under section 829 of the Code. These objections were uniformly overruled by the surrogate, and Ware gave abundant evidence upon the subject of the testator's mental and physical condition during the last week of his life. Among other things, he was permitted to testify, under objection, to a conversation occurring between himself and the testator on Saturday, the twenty-sixth of April, in relation to the subject of an offer by the testator to execute a deed of a certain one hundred acres of land to the witness, which was declined by him. The

conceded error in admitting this evidence was disregarded by the General Term, upon the ground that the objection thereto was not sufficiently specific. The objection immediately succeeded eight previous objections to similar evidence, made upon the ground that the witness was not competent to testify to such transactions and conversations, and that it was "incompetent and immaterial." We think the admission of this evidence was error, and that the trial court was sufficiently apprised of the real nature of the objection by the whole course of the examination of the witness. (*Church v. Howard*, 79 N. Y., 415.) This witness was further permitted to testify to his observations of the testator's acts, conduct and conversations during the four days succeeding the Saturday in question. Excluding, for the present, his evidence on the subject of the execution of the will, he testified, under objection, to eleven different conversations had by the testator with various persons, indicating capacity to converse intelligently and understandingly upon the subject introduced; a recognition of the various persons who visited him; appreciation and intelligent answers to all questions put to him; a consciousness of his physical wants and the ability, in language, to make them known; and, generally, to a sufficient degree of consciousness, intelligence and judgment to show that when he executed his will, he did so with full knowledge and appreciation of the nature and effect of the transaction in which he was engaged.

It is quite impossible to say that this evidence did not have a powerful effect upon the determination of the question of testamentary capacity presented to the surrogate for decision. This evidence was offered and received as bearing upon the condition of the body and mind of the testator, without reference to the particular signification of the language used by him, and was important only as showing the mental capacity of the testator, and whether he had an intelligent understanding and appreciation of what took place within his sight and hearing at the time of the execution of the will. The issue in the case was whether the testator was conscious and of sound disposing mind on the Sunday in question, and Ware's evidence consisted of his observations of the acts, conduct and conversations of the testator as exhibited to those who were attending him. Such evidence was

important and material upon the issue tried, and is clearly within the letter and spirit of those transactions to which the Code prohibits an interested witness from testifying. It was of the same class of evidence as that pronounced by this court to be incompetent under section 829 of the Code in *Holcomb v. Holcomb* (95 N. Y., 316); *Lane v. Lane* (*id.*, 494); *In re Smith* (*id.*, 516).

As indicated by the head-note of *Holcomb v. Holcomb*, it was there held that "the policy of the statute excludes testimony of an interested witness concerning any transaction with the deceased in which the witness in any manner participated, or of any communication in his presence or hearing, if he, in any way, was a party thereto," and that testimony of interested witnesses was improperly received "as to conduct and actions of the deceased, tending to show his enfeebled and dependent condition, and as to statements made by him, although not addressed to the witness, and made in ignorance of his presence."

The case of *Cary v. White* (59 N. Y., 336) is not an authority for the admission of this evidence. Several grounds for the conclusion reached in that case were stated, but a single judge only concurred with the opinion; two judges concurred in the result and two dissented, the remaining judge not voting. One of the grounds suggested in that case was, that the party objecting to the evidence offered was not an assignee of the deceased person within the meaning of the statute. The evidence there sought to be given consisted of a declaration made by the deceased person to his own attorney in the presence of the plaintiff. The point was presented upon an objection to the question calling for the evidence which was sustained by the trial court. The judge who wrote in this court was of the opinion that the question excluded did not necessarily relate to a personal communication or transaction between the deceased person and the witness, and was therefore competent. The case cannot be considered an authority upon the question here presented.

Ware was also permitted to testify, under objection, to the conversation taking place between the testator and Sharer and Barse attending the attestation and publication of the will. His evidence tended, in every material respect, to corroborate the version given of the transaction by Sharer, and conflicted with

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that of Barse. At the time this evidence was admitted, it appeared that Ware had been present during the whole interview, during which the will was alleged to have been executed, and had, confessedly, taken a part in its subscription by the testator. Ware and Sharer were the only persons then present, and Ware supported the testator upon the bed in his arms by the testator's express request, while Sharer guided the hand upon similar request, and assisted Eysaman in subscribing his name to the will. It cannot be doubted that the request to Ware, and acquiescence and participation in the act of the testator in subscribing the will, was a personal transaction and communication between him and the testator within the meaning of the statute. Such must have been the understanding of the proponents, for they voluntarily omitted to examine Ware in chief as to the signing of the will, but confined his evidence to the publication and attestation which followed the testator's subscription. This was claimed by them to be competent as relating to another transaction in which he took no part.

We think it was error to admit this evidence. The act of executing the will, although consisting of several incidents, constituted but one transaction, and derived its efficacy as a valid execution from the performance of each requirement of the statute. The transaction was continuing and related to but one subject, viz., the execution of the will. A participation by a person in any of the material acts required to complete its valid execution made the transaction one between the testator and that person. Ware was present from the subscription to the publication and attestation, and it cannot reasonably be held that he did not participate in the execution of the will.

[*A ruling on another point omitted.*]

Judgment reversed.

NOTE.—In *Matter of Dunham's Will*, 121 N. Y., 575 (obscurely reported), the executor (being also a pecuniary legatee and a residuary legatee) propounded the will. A codicil, propounded by a legatee under the codicil, if proved would reduce the residuary bequest. The executor was offered as a witness in his own behalf to testify to conversations of the testator with the proponent of the codicil, and this was claimed to be not within the spirit of the statute, but rather within the exception, because the executor was testifying in his own behalf.—*Held*, incompetent.

GRAY, J. [*passing on the point, said*]: The ground for the ruling is, that communications in the presence of the witness are deemed to be made to him. While the ruling may be said to be stretched to the extremest tension, it has the merit, possibly, of being in furtherance of justice. The evidence is intended to work here against the respondent, who derives her interest under the testator's codicil, and whose lips are sealed by the law as to the matters; and to permit a witness, so much interested as this one was in the amount of the estate ultimately distributable, to testify to things said and done by testator, though with others, but while he was present, with the only supposable purpose of affecting the interests of the respondent, would certainly seem to be giving an undue advantage to the one as against the other. This is certainly true, if the evidence sought to be elicited is material in its bearing upon the question of restraint or influence upon testator, or upon his disposing strength of mind; while, if it is not material, the exclusion of the evidence has worked no prejudice to the appellant, and, hence, would not require a reversal for error. This section of the Code offers considerable difficulty, in the endeavor to give to its provisions a reasonable and just interpretation; and each case, as it arises, may, in its circumstances, control the application of the rule intended to be established by the Legislature. It suffices, as to this case, to hold that within the authorities cited by me the evidence was properly excluded.

(The cases cited were *Holcomb v. Holcomb*, 95 N. Y., 316, and *Matter of Eysaman*, 113 N. Y., 62, both reported *supra*.)

In *Smith v. Ulman*, 26 Hun, 386, an action for partition between heirs-at-law of Frederick Ulman, deceased, defendant William Ulman was sworn as a witness in his own behalf, and was permitted to testify to a conversation between his father and one Race as follows: "Father told Andrew Race that he had made a bargain with me to come and take care of him during his life, and that he had told Race's wife that she could stay a year according to agreement. Race said the work was rather hard, and he would rather leave right away. He told Race I was to come with my family and take care of him during his life-time. I took some part in the conversation; father commenced it. I told Race he could stay, and he said he would not remain between father and child."

From a judgment for defendant entered upon the report of a referee plaintiff appealed to the General Term.

The General Term reversed the judgment.

OSBORN, J. [*after stating the facts*]: Now, it would seem that Race and his wife had been living on the place prior to, and were so living at the time of the conversation. The objection was that this evidence was inadmissible under section 829 of the Code, as a conversation or personal transaction with the deceased.

We are aware that the courts have held that a party disqualified under this section to swear to a conversation or transaction between

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himself and the deceased, may do so when the conversation is between the deceased and a third party, which he may see or hear and in which he in no manner participates. In the language of BOCKES, J., in *Holcomb v. Holcomb* (20 Hun, 159), after a careful review of all the cases, "If the transaction be one wholly independent of the witness, neither induced by his solicitation or supported by his action, one with which he in no way interferes or joins, it cannot be one of a personal character as regards him." But in this conversation the defendant did participate. He swears distinctly that he took some part in it. He states some things he said, but does not pretend that it was by any means all that he said. But if he said nothing more, it was still inadmissible. The deceased was speaking of the contract between himself and the witness; of the bargain that had been made between them. This was in the presence and hearing of the witness. Suppose the father had lived many years, and the value of the property was entirely inadequate to compensate for the care and maintenance bestowed, so that a claim against the estate could have been established for a much larger amount, and he had undertaken to make such a claim, which was resisted by the estate, on the ground that he had made this agreement, and was entitled to nothing more, would not this evidence have aided, and if the representatives of the estate believed it, have entirely defeated the allowance of such claim? If he had remained entirely silent, would it not have been treated as an assent on his part to the agreement as thus stated by the deceased to the witness Race? Clearly so. If a party stands by and hears another state over an agreement in which he has an interest; if not true, and it is to his prejudice, is he not bound to speak at once, or forever after keep his mouth closed? But here defendant admits that he went farther than to remain silent, and impliedly admitted that the agreement as stated was correct, and that he was willing to carry out the agreement which his father had made with Race and his wife; in a word, it is a conversation in which all three participated. The deceased stated the agreement to Race. Race then made his statement, and the defendant William assented in express words to it. As before stated, this was clearly inadmissible under the section above referred to, and in direct violation of its spirit and meaning, as well as its express language.

In *Lane v. Lane*, 95 N. Y., 494, the probate of a will was contested by the heirs-at-law. It appeared that through partial paralysis of his vocal organs, the testator, at the time he executed the will, was unable to utter words, but he made sounds intelligible to those familiar with him, and signs, which, to some extent, anyone could interpret. His wife went with him to the house of the scrivener who drew the will. She was executrix and legatee.—*Held*, that she was incompetent to testify to anything said by her to the testator, or to what he communicated to her or others, in reply.

NOTE OF RECENT CASES ON WHAT TRANSACTIONS OR COMMUNICATIONS WITH DECEASED ARE WITHIN THE PROHIBITION OF THE STATUTE.

Arkansas: Nunnally v. Becker, 52 Ark., 550; s. c. 13 Southwest. Rep., 79 (in an action for conversion against an administrator, plaintiff cannot testify as to the delivery of the property to deceased). *Florida*: Hollday v. McKinney, 22 Fla., 153 (in replevin, plaintiff cannot testify as to deceased's handwriting to establish his signature to a bill of sale). Lewis v. Meginniss, 30 *id.*, 419; 12 Southern Rep., 19 (an agent to establish his commissions may testify as to the sums of money collected for a deceased person, and what would be a reasonable compensation for collecting it). *Indiana*: Merritt v. Straw, Ind. App., 1893, 33 Northeast. Rep., 657 (in an action by an administrator upon a note, defendant cannot testify as to deceased's handwriting to establish receipts purporting to be signed by him). *Iowa*: Sankey v. Cook, 1891, 47 Northwest. Rep., 1077 (opinion as to a deceased's handwriting is not testimony as to a transaction with him). McElhenny v. Hendricks, 1891, 48 *id.*, 1056 (where defendant produced checks to show payment, he may testify that he did not deliver them to another than decedent). *Kentucky*: Williams v. Williams, 1890, 13 Southwest. Rep., 250 (under Ky. Civ. Code, § 1890, a contestant of a will may testify as to deceased's conduct and conversations). *Maryland*: Webster v. Le Compte, 1891, 22 Atlantic Rep., 232 (plaintiff may not testify as to the contents of his own letter to deceased, though the administrator fails to produce it after notice). *Minnesota*: Hall v. Northwestern, etc. Ass'n., 47 Minn., 85; s. c. 49 Northwest. Rep., 524 (plaintiff may testify as to the reading of a letter in deceased's presence; the Minnesota statute applies only to spoken words and not acts of deceased from which admissions may be implied). *New Hampshire*: Simpson v. Gafney, 20 Atlantic Rep., 931 (in an action for personal injuries which occurred while plaintiff was riding with a person since deceased, plaintiff cannot testify as to her want of knowledge of the horses, peculiarities, etc., as such matters must have been equally within the knowledge of deceased). Sabre v. Smith, 62 N. H., 663 (a party cannot testify as to the contents of a lost letter received from deceased). *New Jersey*: Mathews v. Hoagland, 1891, 21 Atlantic Rep., 1054 (a party cannot testify as to transactions between deceased and another in which the witness and such person was interested, though their interests were distinct). *New York*: Wing v. Bliss, 8 N. Y. Supp., 500 (plaintiff may testify that he found a letter on his desk in deceased's handwriting). Spicer v. Spicer, 54 N. Y. Super. Ct., 280 (in a suit to set aside a deed for fraud upon deceased; defendant cannot testify how long the deed remained in his possession). Hard v. Ashley, 117 N. Y., 606; s. c. 23 Northeast. Rep., 177 (where evidence of deced-

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ent's statements prior to an agreement's execution has been admitted without objection, defendants may testify they relied on the statements; as such testimony does not relate to any matter which deceased could contradict). *Heyne v. Doerfler*, 124 N. Y., 505; s. c. 26 Northwest. Rep., 1044 (a third person's presence does not render plaintiff's testimony as to a conversation with deceased competent; nor can a nurse testify as to his visits to deceased's house, in an action for services). *Matter of McArthur*, 12 N. Y. Supp., 822 (an interested witness' testimony as to testator's appearance to show testamentary incompetency is inadmissible); s. p. *Matter of Bartholic*, 12 *id.*, 640. *Harrington v. Winn*, 14 *id.*, 612 (to show delivery of goods to deceased, plaintiff cannot testify that F. made entries in a book under deceased's directions and read them aloud to deceased). *Myers v. Hunt*, 14 *id.*, 471 (plaintiff cannot testify that decedent's note was never paid). *Gregory v. Fichtner*, 27 Abb. N. C., 86; s. c. 14 N. Y. Supp., 891 (in an action of conversion against an administrator, plaintiff cannot testify as to the contents of a box delivered to intestate through a third person, nor as to the value of the goods). *Finton v. Eggleston*, 61 Hun, 246; s. c. 16 N. Y. Supp., 721 (in an action for a breach of warranty, plaintiff is incompetent to testify that he left a notice that he was being sued for the land at the house of the deceased vendor). *Mortimer v. Chambers*, 63 Hun, 335; s. c. 17 N. Y. Supp., 874 (to prove decedent's delivery of notes, plaintiff may testify that they were in his possession before decedent died). *Hall v. Roberts*, 63 Hun, 473; s. c. 18 N. Y. Supp., 480 (to disprove notice by decedent to him, plaintiff may not testify that he had received no information from any source). *Martin v. Hillen*, 21 N. Y. Supp., 309 (in an action against a husband for the conversion of his deceased wife's bonds, he cannot testify that he did not know that his wife possessed any property, except a monthly payment). *McMurray v. McMurray*, 63 Hun, 183 (a mortgagee cannot testify as to the non-payment of the mortgage by the deceased mortgagor). *Hard v. Ashley*, 18 N. Y. Supp., 413 (neither of two defendants can testify as to what he heard decedent say to the other concerning both defendants' joint rights). *Matter of Bernsee*, 17 *id.*, 669 (a devisee present at the execution of a will may corroborate an attesting witness). *Matter of McCarthy*, 20 *id.*, 581 (evidence as to testator's physical condition when the witness reached his home and as to whether he left his bedroom after her arrival, is not objectionable as relating to a transaction or communication with a deceased person). *Van Vechten v. Van Vechten*, 47 State Rep., 511; s. c. 65 Hun, 215 (rule applied, in an action brought to have a deed declared a mortgage, to exclude letters written by defendant to the original grantor, and found in his trunk after his death, and the indorsement on a note from the grantor to the defendant, found in the same place, which defendant claimed to have made on the note at the time of the conveyance to him). *North Dakota: Hutchinson v. Cleary*, 1893, 55 Northwest. Rep., 729 (a defendant is prohibited from testifying as to a conversation with plaintiff's intestate, though decedent's agent was present at the time the conversation took place). *North Carolina: Cornelius v. Brawley*, 109 N.

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C., 542; s. c. 14 Southeast. Rep., 78 (legatee may testify as to the finding of a will). *Simpson v. Simpson*, 107 N. C., 552; s. c. 12 Southeast. Rep., 447 (a mortgagee cannot testify as to how much has been paid by deceased mortgagor). *Watts v. Warren*, 108 N. C., 514; s. c. 12 Southeast. Rep., 232 (in an action to set aside decedent's assignment of an insurance policy, to show consideration defendant may testify that he paid decedent's debts). *Hopkins v. Bowers*, 111 N. C., 175 (a widow, who is a party to the action, cannot testify as to her marriage with her deceased husband). *Ferebee v. Pritchard*, 1893, 16 Southeast. Rep., 903 (in an action by a husband after his wife's death to set aside a conveyance made by her, he is a competent witness to prove that the signature of a letter in which the writer promised to marry him was in his wife's handwriting). *Pennsylvania*: *Keener v. Zartman*, 144 Pa. St., 179; s. c. 22 Atlantic Rep., 889 (under Pa. Stat., a witness, though an interested party, is competent to prove decedent's book entries). *Mell v. Barrier*, 19 *id.*, 940 (the maker of a note is incompetent to prove payment to the deceased payee). *Toomey's Estate*, 1892, 24 *id.*, 697 (where a claim against an estate is contested for forgery, an heir is not competent to testify as to deceased's handwriting). *South Carolina*: *Griffin v. Earle*, 34 S. C., 246; s. c. 13 Southeast. Rep., 473 (a party may testify that he had no conversation with deceased). *Foggeth v. Gaffney*, 33 S. C., 303; s. c. 12 Southeast. Rep., 260 (plaintiff may testify as to work done on the premises of deceased when he was at home and could not have been ignorant of the work). *Sullivan v. Latimer*, 1893, 17 *id.*, 701 (a witness may testify as to a conversation between his wife and a deceased person in which he took no part). *Tennessee*: *Montague v. Thomson*, 1892, 18 Southwest. Rep., 264 (a surviving party cannot testify as to the contents of a lost letter from deceased). *Texas*: *Choate v. Huff*, 18 Southwest. Rep., 87 (plaintiff cannot testify that he lost a note executed by a deceased person). *United States*: *Andrews v. Hunt*, 7 Mackey, 311 (under U. S. R. S., § 858, a party may testify that a transaction with deceased never took place). *Vermont*: *Orr v. Clark*, 1890, 19 Atlantic Rep., 929 (where an instrument executed by deceased under which plaintiff claims is in the possession of defendant, who refuses to produce it, plaintiff may prove its contents by a party to the instrument). *West Virginia*: *Voss v. King*, 33 W. Va., 236 (a party may testify as to a transaction with a deceased agent of deceased).

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NAY v. CURLEY.

New York Court of Appeals, 1889.

[Reported in 113 N. Y., 575.]

Section 829 of N. Y. Code Civ. Pro.—disqualifying an interested witness as to a personal transaction with a decedent, etc.—is subject to the common law principle in the law of evidence, that where a party calls a witness and examines him as to a part of a communication or transaction, the other party may call out any other part of the communication or transaction tending to explain or qualify or put in a different light the particular part called out by the examination in chief.*

In an action on behalf of the estate of a decedent, plaintiffs, to prove that money the decedent had paid to the defendant by check, was a loan (not a payment of a debt as would otherwise be presumed by the law) called defendant and asked if at the time of the transaction the decedent owed him any money. He answered, No.

Held, that this opened the door for him to be called and examined on his own behalf as to what took place in that transaction between him and the decedent.

The prohibition of the statute cannot be avoided by putting a question which does not purport to allude to any particular transaction, but the answer to which must affirm or deny the having a transaction in a manner which even indirectly will raise or rebut an inference as to some material element therein.

An action to recover an alleged loan made by plaintiff's intestate to defendant. The answer contained a general denial.

Plaintiffs gave in evidence a check signed by the intestate, payable to defendant, and proved that it was delivered to, indorsed by and paid to him.

Plaintiff called the defendant as a witness, and asked him, "On the 22d day of December, 1886 (the date of the check), did Joseph O. Nay owe you any money?" And the defendant answered, "No, sir."

The defendant, on assuming the defense, offered himself as a witness in his own behalf, and after stating that he received the check from the drawer, was asked by his counsel, "State what took place between you and him?"

The plaintiff's counsel objected to the question, on the ground that it was incompetent, and it was excluded by the court.

*The leading case on this principle as now applied is *Rouse v. Whited*, 25 N. Y., 170.

Upon a *verdict*, judgment entered for plaintiff.

The Court of Common Pleas at General Term affirmed the judgment without opinion.

The Court of Appeals reversed the judgment.

ANDREWS, J. [*after stating the facts*]: There can be no doubt that the question was properly excluded, assuming that the plaintiffs had not opened the matter by their examination of the defendant. The evidence sought to be elicited by the excluded question directly pointed to the transaction between the witness and the decedent at the time the check was given, and called for a narrative of what took place between them on that occasion. It was evidence directly within the prohibition of section 829, and did not fall within the exception in that section, since the plaintiffs had not been examined concerning that transaction, in their own behalf or otherwise. There was no error, therefore, in excluding the question put to the defendant, if its admissibility is to be determined by section 829. But that section was not intended to abrogate the principle in the law of evidence, that where a party calls a witness and examines him as to a particular part of a communication or transaction, the other party may call out the whole of the communication or transaction bearing upon or tending to explain or qualify the particular part to which the examination of the other party was directed. This rule does not need the sanction of authority. It is founded upon obvious equity and justice. A part of the truth often implies a falsehood, and in the search for truth, through the examination of witnesses, courts do not countenance partial statements of facts by witnesses. The principle adverted to is just as applicable in reason to a case where a party calls an adverse party and examines him as to one fact or phase of a transaction in his favor, and then discontinues the inquiry, as in any other. The party examined by the other may, at his own instance, complete the narration for the purpose of explaining, modifying or putting in a different light the particular part to which the examination by the adverse party was restricted. Section 829 in no manner affects the application of the rule. If

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a party calls the adverse party and examines him as to a personal communication or transaction with a deceased person, in reference to which he would be precluded from testifying in his own behalf under that section, the witness is entitled to state the whole transaction or conversation and thereby explain or qualify the testimony called out by the other party. This was explicitly held in *Merritt v. Campbell* (79 N. Y., 625).

The correctness of the ruling, excluding the defendant from testifying in his own behalf as to what took place between the intestate and himself at the time the check was given, turns upon the point whether the plaintiffs by asking the defendant, on their examination, whether on the day the check was given their intestate owed him anything, and obtaining an answer in the negative, thereby gave proof as to the transaction between the parties at the time of giving the check, and opened the way to the defendant to testify thereto. Evidence of a personal transaction between parties may become material on a trial, (1) where the cause of action originates in the transaction sought to be proved, the transaction itself creating the duty or obligation; or (2), where the communication or transaction tends to establish an antecedent cause of action, or to disprove it, as, for example, where admissions are relied upon, made by one party to the other; or, (3), where the original cause of action is admitted, and the communication or transaction is sought to be proved to show that the cause of action had been satisfied or discharged, as by payment or otherwise. In the present case the cause of action, if any, arose out of the giving of the check, and whether it created a cause of action depended upon the real nature of that transaction, whether the check represented a loan, gift or something else. The check, on its face, imported a personal transaction between the parties to the instrument, and that it was, in fact, a personal transaction between them was shown outside of the testimony of the defendant. The material issue was, what was the real character of that transaction. The plaintiffs, by calling the defendant and proving by him that the intestate owed him nothing when the check was given, showed that the transaction was not a payment, and, by eliminating this element, characterized the transaction as a loan. If the question put to

defendant by the plaintiffs had been in a direct form as, for instance, "Was the check given for a debt?" no doubt could be entertained that the question would have been concerning the transaction between the parties when the check was given, and, if answered in the negative, the door would have been opened to the defendant to show what the transaction was, and that it was not a loan, which would be the presumption in the absence of further explanation. The mere form of the question can make no difference, if the question put, in substance, called for an affirmation or negation as to the character of the transaction in question. The point is the same in principle as if the defendant, not having been called as a witness by the plaintiffs, had offered himself as a witness in his own behalf, and, with a view of showing that the check was given in payment of a debt, had been asked: "Was the intestate, on the day of the date of the check, indebted to you in the amount for which the check was given?" It is plain that he could not have been permitted to testify directly that he received the check in payment of a debt, or that it was not given as a loan, or that it was a gift, because this would be permitting him to testify what the transaction was. It is equally plain, we think, he could not have been permitted indirectly to accomplish the same end by permitting him to testify that when the check was given there was a debt owing him by the intestate of the same amount, thereby excluding the idea of a loan, and raising the inference that the transaction was a payment. He could not in this way be permitted to characterize the transaction, *i. e.*, to show what it was not, and to accomplish by indirection what he could not have done directly. The plaintiffs could not ask the defendant, as their witness, the same question, except at the risk of opening the whole transaction. They could not call the defendant and show by him that there was no debt and, consequently, that the transaction was not the payment of a debt, and preclude him from testifying as to what the transaction was, or that it was not that which the evidence given by him on their examination presumptively established it to have been.

There is difficulty in administering the rule declared in section 829. The survivor of one of two parties is not precluded by that section from testifying to any independent fact material to

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the litigation, that is, to any fact which does not involve the disclosure of a personal transaction or communication with the deceased, or is not concerning such personal transaction or communication. Every material fact tends, directly or indirectly to prove or disprove the issue to which it relates. But the survivor is not precluded from testifying in his own behalf to a material fact, simply because it may throw light upon and tend to prove or disprove the transaction in issue. The statute closes the lips of the survivor only as to personal dealings between the parties. It does not deprive him of the right to testify to any material fact known to him, not involving the disclosure of a personal transaction with the decedent, although such fact may indirectly prove or disprove a personal transaction upon which the suit is founded. In other words, the testimony of the survivor is not excluded because it bears upon the issue to be decided or because it bears upon a personal transaction which is itself the subject of the inquiry. It is excluded only when it is in effect a disclosure of what has occurred between the witness and the deceased in relation to the subject in controversy. If, in substance, the fact sought to be elicited respects a personal transaction and tends directly to disclose a personal transaction, or the presence or absence of some element in a personal transaction, then the fact is not, we think, an independent one, and the survivor is precluded from testifying to it, unless the way is opened by his examination by the other party. (*Tooley v. Bacon*, 70 N. Y., 34; *Maverick v. Marvel*, 90 *id.*, 656; *Koehler v. Adler*, 78 *id.*, 287; *Lerche v. Brasher*, 104 N. Y., 157; *Clift v. Moses*, 112 *id.*, 426.) The examination of the defendant by the plaintiffs, as to the existence of a debt between the witness and the intestate when the check was given, directly bore upon the nature and character of the transaction, and was an indirect method of proving the transaction itself. They thereby made the defendant a competent witness to testify in his own behalf as to the same transaction.

For the error of the trial court in rejecting the evidence of the defendant the judgment should be reversed.

All concur.

Judgment reversed.

NOTE.—In *Lewis v. Merritt*, 98 N. Y., 206, an action by an executor for conversion of notes belonging to testatrix, plaintiff swore that deceased kept the notes in a trunk in her room and that he saw them there the morning before she died. The notes thereafter were found in possession of the defendant. Defendant claimed that the testatrix gave him the notes two days prior to her death as a gift.—*Held*, error not to allow him to be asked “if he took the notes from any trunk or person.”

RUGER, Ch. J. [*deciding the case, says*]: The excluded evidence did not purport to be admissible, nor was it offered for the purpose of establishing an affirmative defense; but it is claimed to have been competent, as tending to overthrow a fact upon which plaintiff's cause of action solely rested, and which was testified to by the plaintiff alone. While of course it is not competent for a party, when called as a witness in his own behalf against one representing a deceased person, to testify affirmatively as to any transaction or communication had personally with such deceased person, or whether a particular interview between them took place or not, unless his adversary is first examined in reference thereto, or the evidence of the deceased person given on some former occasion is proved on the trial; yet this does not necessarily and under all circumstances exclude the evidence of the surviving party, when it tends to negate, or affirm, the existence of such transaction or communication. The object and intent of the restriction placed upon the survivor of those engaged in personal dealings and transactions, from giving evidence in relation thereto, will be accomplished, if it is limited to cases which preclude him from giving such evidence when it is offered for the purpose of establishing an affirmative cause of action or defense. It is difficult to lay down any general rule which shall cover all possible transactions, but it is safe to say when a party gives material evidence as to extraneous facts, which may or not involve the negation or affirmation of the existence of a personal transaction or communication with a deceased person, that the adverse party, although precluded from directly proving the existence of such communication or transaction, may give evidence of extraneous facts tending to controvert his adversary's proof, although those facts may also incidentally involve the negation or affirmation of such personal communications or transactions.

Potts v. Mayer, 86 N. Y., 302.

POTTS v. MAYER.

New York Court of Appeals, 1881.

[Reported in 86 N. Y., 302.]

Where the testimony of the deceased party, taken at a former trial, has been introduced in evidence by one party, a witness, otherwise disqualified under § 829, may testify on behalf of the other, in contradiction or correction of the matters testified to by the deceased witness.

Hyman and Mayer as makers and Kohn as endorser were sued on a note, the defense being that Kohn paid no consideration, etc. After Hyman only was served, trial was had, and he testified in his own behalf. After judgment against him he died. Mayer was then summoned, under Code Pro. § 375, to show cause why he should not be bound by the judgment. On the trial after *his* answer, his counsel read from the direct examination of Mayer on the first trial, the following: Q. "What did Kohn, the endorser, give you for the note?" A. "Nothing, but I paid for the note to Mr. Mayer."

Plaintiff then read in evidence the cross-examination of the same witness upon the previous trial, wherein he testified that Mayer was indebted to the witness in the amount of the note upon a private account, for which the note was given.

The *defendant* then called Mayer as a witness to contradict the evidence of Hyman as to the consideration of the note and was asked this question by defendant's counsel: "You have heard the testimony of Mr. Hyman which has been read in relation to his giving you the money for this note?"

A. "I have."

Q. "Is that correct?"

Objected to as incompetent under the Code, objection sustained, and exception taken. .

Benj. F. Carpenter, for defendant.

R. S. Newcombe, for plaintiff.

Judgment was entered for plaintiff upon a *verdict*.

The Superior Court at General Term affirmed the judgment, being of opinion that it being conceded that the note had, with Mayer's assent, been executed, indorsed and delivered by Hyman, the proposed testimony was incompetent under N. Y. Code Civ. Pro., § 829. Nor did the testimony come within the saving clause of that section, because Hyman was Mayer's own witness. The exception made by that clause would have applied only if the plaintiff upon the said question of value, had been examined in his own behalf or had read the testimony of Hyman as part of his case.

The Court of Appeals reversed the judgment.

FINCH, J. [*after stating the facts*]: The offered evidence was within the letter and the spirit of the exception in the Code which permits such evidence to be given where the testimony of the deceased person is given in evidence concerning the same transaction or communication. (Code, § 829.) The obvious intention of the statute is to preserve equality, and prevent unfair advantage. The mouth of the survivor is closed because the other party to the transaction is dead, and to allow the living witness to speak, secure from the contradiction or correction of his adversary, is to give him an advantage manifestly unfair, and dangerous to the truth. Such inequality and injustice does not exist, however, where the deceased party has spoken and his statement of a transaction is put in evidence. In that event, to allow the dead man to speak through his declarations while living, and deny the right of contradiction or correction to the surviving party, would shift the unfair advantage to those representing the deceased party, and it was to obviate such injustice that the exception in the statute was framed. The question is not, as the respondent states it, whether a party can put in evidence the adverse statements of a deceased party, and so open the door to his own version of the same transaction. If that was, in truth, the question, we should be very likely to feel the force of the respondent's argument in favor of excluding the proposed contradiction. But here the plaintiff himself read in his own behalf the cross-examination of the deceased party, showing, what had nowhere else appeared

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in the case, the existence of an indebtedness due from the defendant Mayer to Hyman, and which constituted the agreed consideration of the note. By this proof of the sworn declarations of the deceased, the plaintiff encountered the exception in the Code, and exposed himself to the evidence of the defendant Mayer as to the same transaction. The ruling which excluded the offered proof was, therefore, erroneous.

The judgment should be reversed; new trial granted, costs to abide the event.

All the judges concurred.

Judgment reversed.

In *Corning v. Walker*, 100 N. Y., 547, an action brought by plaintiff as assignee to recover moneys loaned to defendant by a firm in which Erastus Corning, Sr. (who died before trial), and plaintiff were partners.

The defense was that the moneys were had by the defendant as payment for services and not as loans.

Plaintiff, as a witness in his own behalf, testified that neither he nor the company ever authorized any money to be advanced to defendant by way of payment for services.

Upon a cross-examination by the defendant's counsel, the plaintiff testified that he knew there could have been no arrangement between defendant and Corning, Sr., as to payment for defendant's services, from what Corning, Sr., told witness.

Thereafter defendant on his own behalf offered to prove an arrangement between Corning, Sr., and himself.

This evidence was objected to and excluded as incompetent under section 829 of the Code.—*Held*, no error.

MILLER, J. [*deciding the points, says*]: We think the testimony offered was not competent on any such ground. The defendant was not required to examine the witness in order to explain his testimony upon the direct examination, by introducing evidence as to the declarations of Mr. Corning, Sr., and by doing so did not open the door to the introduction of conversations had by him with a deceased person. Even if it may be assumed that this testimony related to the same subject in regard to which the plaintiff had given evidence, it was not given by the plaintiff in his own behalf so as to authorize a contradiction of the same. It was drawn out on a cross-examination by the defendant's counsel, and cannot therefore be considered to have been given on behalf of the plaintiff and for that reason could not properly be contradicted. There is no rule which authorizes a party to contradict evidence given by his adversary, as to a transaction with a deceased person, which he has himself introduced, and the Code does not provide for any such case. The testimony being introduced by the defendant himself, he was not authorized to contradict it by showing an interview with a deceased party in relation to the same subject.

It may be added that it is not apparent that the introduction of the books of the firm in connection with the testimony given by Erastus Corning, Jr., furnished any ground for the cross-examination of the witness in reference to a conversation had between him and a deceased person, or rendered the evidence offered competent for the purpose of exonerating him from the liability established by the proof given. The testimony offered was indefinite and did not of itself include any conversation with a deceased party or purport to relate to the evidence which had been given, and in this respect it was also liable to objection.

The case of *Lewis v. Merritt* (98 N. Y., 209), cited by the appellant, has no application.

PINNEY v. ORTH.

New York Court of Appeals, 1882.

[Reported in 88 N. Y., 447.]

While a party cannot testify that any particular conversation testified to by a witness as having taken place in his presence between the party and the deceased did not take place, he is not precluded from testifying to extraneous facts or circumstances which tend to show that such witness testified falsely, or that it was impossible that his statement can be true, *e. g.*, that the witness was never present at the place specified when any conversation occurred between himself and the deceased; nor is such party precluded from testifying that the interview did not occur at the place named by the witness, but in a different place.

Plaintiff sued, as administratrix, to recover for services rendered by her intestate to the defendants as their attorney. The facts are fully stated in the opinion.

Judgment was entered for plaintiff upon the report of a referee.

The General Term affirmed the judgment.

The Court of Appeals reversed the judgment.

RAPALLO, J. On the trial of this action John Streib, a witness on the part of the plaintiff, and formerly the managing clerk of plaintiff's intestate, testified to certain conversations between plaintiff's intestate and the defendant Orth, material to the issues in this case, at which conversations Streib stated he was present,

and that the conversations took place at the office of deceased. The defendant Orth was called as a witness in his own behalf, and the referee very properly refused to allow him to testify as to what was said, or what was not said, between him and the deceased at those interviews. Mr. Orth was then asked whether he ever had any conversation with the deceased at his office at which Streib was present, and at which Orth made certain statements to deceased, which Streib had testified to.

These questions were excluded and we think properly, because they related to what was said between Orth and deceased, and not merely to the fact of Streib's presence at an interview between them. But the counsel for the defendants then asked Orth whether or not he had a conversation with deceased, at his office, at which Streib was present; also whether Streib was ever present with Orth in the office of the deceased, when the deceased was looking up authorities in the case of *Friend v. Orth* (a fact to which Streib had testified, and which was relevant).

These questions were excluded and exceptions taken. Peter Cook, another witness for the plaintiff, and his attorney in this action, gave important testimony as to the services of deceased and their value, and testified to twenty interviews and conversations between Orth and deceased at which he said he was present and which related to the sale of a distillery, for the services of deceased in which matter, the plaintiff has been allowed by the referee \$2,500. Mr. Cook testified that deceased had a dark room, and that there was also a large room; that up to the fifteenth or sixteenth of their conversations they all took place in the large room, and witness was present at every one of them; that the sixteenth was had in the large room and the eighteenth in the same room. Where the others were had did not clearly appear, but the witness testified that Orth and deceased did not sit in the dark room.

When Mr. Orth was on the stand he was asked whether Mr. Cook was ever present with him and deceased at any conversation in regard to the distillery. This question was excluded, but was afterward answered. He was afterward asked whether he had daily meetings with deceased, at which Cook was present

(Mr. Cook having testified to such meetings), and this was excluded. He was asked in which room at the office of deceased he had conversations with him; this was excluded, and the question whether deceased saw him in the dark room, was also excluded.

We think the referee went too far in excluding the inquiries above referred to. Section 829 of the Code prohibits the examination of a party as a witness in his own behalf against the executor, etc., of a deceased person "concerning a personal transaction or communication between the witness and the deceased person." It is contended that the purpose of this prohibition is, in all cases where a personal transaction between a surviving party and the representatives of a deceased party comes in question, to confine the survivor to such evidence concerning the transaction as was admissible at common law; and that, consequently, if a competent witness testifies to such a transaction the survivor is not only prohibited from contradicting him directly, but is also precluded from contradicting him indirectly, by testifying to facts which tend to show that his testimony is not true; for it is claimed that any testimony which bears upon the question whether or not the transaction testified to took place, is testimony concerning the transaction, and the surviving party is not a competent witness on that subject, but must rely wholly on common law evidence.

We cannot assent to this construction of the section. By other provisions of the Code, parties to actions are declared to be competent witnesses in their own behalf, and the special prohibition contained in section 829 is an exception to the general rule. The primary intent of this prohibition is very apparent, and is to prevent a surviving party from proving, by his own testimony, a personal transaction or communication between himself and a deceased person, which, but for the prohibition, he might do without fear or possibility of contradiction. The language of the prohibition is sufficiently broad to prohibit the survivor from testifying that any particular communication or transaction did not take place, personally, between himself and the deceased, but there we think the prohibition ends, and that it does not preclude the survivor from testifying to extraneous facts or circumstances,

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which tend to show that a witness who has testified affirmatively to such a transaction or communication has testified falsely, or that it is impossible that his statement can be true, as, for instance, that the survivor was at the time absent from the country where the transaction is stated to have occurred, and that so long as the survivor refrains from testifying as to anything that passed, or did not pass personally between himself and the deceased, it is not a valid objection to his testimony that the facts which he states bear upon the issue, whether or not the personal transaction in question took place, or upon the truth of the testimony by which such transaction is sought to be proved against him.

We think that Mr. Orth for instance was competent to testify that he was not in the city of New York at the time referred to by the witness, or that the witness was at some other place, or that he never met the witness at the office where the conversations are alleged to have occurred, and on the same principle we see no reason why he should not have been allowed to testify that the witness was never present at that office when any conversation took place between Mr. Orth and the deceased, so long as he refrained from testifying as to anything that was or was not said between him and the deceased.

The fact that the interviews between the party and the deceased did not occur at the place named by the witness, but in a different room, we think was an independent fact, inquiry as to which did not trench upon the rule. It was not testimony as to the transaction itself, but as to the fact, whether the witness saw the party and the deceased together at the place named by the witness. A party surely ought to be allowed to testify that he never was in a particular house, or room, or never met the witness or the deceased there, for the purpose of contradicting the witness who testifies to a transaction between them at that place.

[*A ruling on the materiality of the evidence is omitted.*]

The judgment should be reversed, and a new trial ordered, costs to abide the event.

All concur; except EARL and DANFORTH, J J., who dissent as to admissibility of Orth's testimony regarding a conversation he had with deceased in presence of Streib.

Judgment reversed.

NOTES OF OTHER RECENT CASES ON OPENING THE DOOR.

Georgia: Skelton v. Richardson, 77 Ga., 546 (testimony of defendant's witness as to payments by defendant's intestate cannot be rebutted by plaintiff's testimony). Rudolph v. Underwood, 88 Ga., 664; s. c. 16 South-east. Rep., 55 (where plaintiff testifies that no payment was made to a deceased person in her presence, defendant is not a competent witness to prove payment to deceased, unless he testifies that it was not made in presence of plaintiff). *Indiana*: Allen v. Jones, 1891, 27 Northeast. Rep., 116 (plaintiff cannot testify in rebuttal as to what took place at an interview between himself and decedent concerning which a witness has testified for the defense). *Maryland*: Webster v. Le Compte, 1891, 22 Atlantic Rep., 232 (where witnesses for defendant, and administrator, have testified as to conversations with plaintiffs, plaintiffs are incompetent to testify in rebuttal as to such conversations). *Michigan*: Dunlap v. Dunlap, 94 Mich. 11 (where heirs interrogate the adverse party as to matters equally within the knowledge of deceased, the witness may testify in explanation of the matters drawn out). *Minnesota*: Redding v. Godwin, 44 Minn., 355; s. c. 46 Northwest. Rep., 355 (where disinterested witnesses testify as to the fraudulent representations made by defendant to deceased, defendant cannot testify that in conversations referred to by the witnesses he did not make such representations). *Missouri*: Allen v. Choteau, 102 Mo., 309; s. c. 14 Southwest. Rep., 869 (where a testator's deposition is introduced, the adverse party may testify only as to matters covered by the deposition, and no further). Hayden v. Grill, 42 Mo. App., 1 (where testimony of a person, since deceased, taken on a former trial, is received in evidence on a second trial, an objection that the adversaries' testimony gives a different version must be specifically taken). Stone v. Hunt, 1893, 21 Southwest. Rep., 454 (where the testimony of a deceased party on a former trial is preserved, the opposite party may testify as to the matters to which the testimony of the deceased party relates, though such testimony has not been introduced in evidence by the representative of deceased). *Nebraska*: American Savings Bank v. Harrington, 1892, 32 Northwest. Rep., 376 (where deceased's representatives call out a part of a transaction with deceased on direct examination, the opposite party, on cross-examination may examine as to the whole). *New Jersey*: Matthews v. Hoagland, 1891, 21 Atlantic Rep., 1054 (if executor testifies as to transactions with deceased, the other party may be a witness as to all transactions or statements of deceased pertinent to the case). Joss v. Mohn, N. J. L., 1893, 26 *id.*, 987 (plaintiff, by calling defendant as a witness as to transactions with and statements by deceased, does not thereby acquire competency himself to testify as to such matters). *New York*: Weston v. Reich, 7 N. Y. Supp., 784 (the cross-examining of defendant as to the contents of a letter from plaintiff since deceased, does not enable defend-

Note on Opening Door.

ant to testify as to conversations with plaintiff preceding the writing). *De Varry v. Schuyler*, 8 *id.*, 221 (though executor testified that testator's signature to a note was not genuine, defendant cannot testify that he received the notes from deceased). *Davis v. Gallagher*, 9 *id.*, 11 (where deceased's representative testifies as to a transaction between deceased and the opposite party the latter may also testify in relation thereto); s. p. *Wilcox v. Corwin*, 117 N. Y., 500; s. c. 23 Northeast. Rep., 165; *Matter of Bedlow*, 67 Hun, 408; s. c. 22 N. Y., Supp., 290 (the examination of the mother of beneficiary as to a transaction with deceased, she not being an interested party, does not entitle the adverse party to testify in relation thereto). *McMurray v. Ennis*, 14 N. Y., Supp. 635 (permitting a party to testify as to transactions with deceased does not prevent a subsequent objection to further testimony as to such transaction); *Blankman v. McQueen*, 13 *id.*, 663 (on redirect examination, an interested witness may testify as to a transaction with deceased, if on cross-examination he was questioned on the subject by the administrator's counsel); *Harring-v. Winn*, 14 *id.*, 612 (the answering by executrix on cross-examination as to testator's conversation with plaintiff does not enable plaintiff to testify as to it); *Brown v. Burgett*, 15 *id.*, 942 (in an action for the price of land deceased's assignee testified that plaintiff had told him that deceased had paid for the land by transferring to plaintiff a contract for the purchase of certain other lands; *held*, that this did not permit plaintiff to deny that he took such transfer in payment); *Hard v. Ashley*, 18 *id.*, 413 (proof of transaction with deceased by a disinterested witness does not authorize an interested party to give his version). *North Carolina*: *Hopkins v. Brown*, 108 N. C., 298; 12 Southeast. Rep., 984 (to prove meretricious union and illegitimacy, heirs produced deceased's alleged widow and children to show that they had negro blood; *held*, that this did not make the woman a competent witness as to her marriage with deceased). *Rhode Island*: *Bowen v. Bowen*, R. I., 1892, 24 Atlantic Rep., 714 (where opposite party calls defendant to account, his account under oath may be received, though it relates to transaction with deceased).

Moody v. Rowell, 17 Pick., 490.

MOODY v. ROWELL.

Supreme Court of Massachusetts, 1835.

[Reported in 17 Pickering, 490.]

Leading questions may in the discretion of the court be put to a witness on cross-examination, although relating to matters not inquired of upon the direct examination.

Assumpsit on a promissory note.

The defense rested on the ground that the signatures of the defendant and of the payee were forged.

Henry H. Brown was called as a witness by the defendant and examined as to the handwriting of the payee. On cross-examination by plaintiff, as to defendant's handwriting, one of the questions was objected to as leading. The objection was sustained and the plaintiff not permitted to cross-examine the witness as to the defendant's signature, he not having been questioned on that subject by the defendant.

At the trial, a verdict was rendered for the defendant.

On exceptions to several rulings as to admission of evidence, the plaintiff moved for a new trial.

The *Supreme Court* declared the plaintiff entitled to a new trial.

SHAW, C. J. [*after considering other points*]: The court have no doubt, that it is within the discretion of a judge at the trial, under particular circumstances, to permit a leading question to be put to one's own witness, as when he is manifestly reluctant and hostile to the interests of the party calling him, or where he has exhausted his memory without stating the particular required, where it is a proper name, or other fact, which cannot be significantly pointed to by a general interrogatory, or where the witness is a child of tender years, whose attention can be called to the matter required only by a pointed or leading

question. So a judge may, in his discretion, prohibit certain leading questions from being put to an adversary's witness, where the witness shows a strong interest or bias in favor of the cross-examining party, and needs only an intimation, to say whatever is most favorable to that party. The witness may have purposely concealed such bias, in favor of one party, to induce the other to call him and make him his witness; or the party calling him may be compelled to do so, to prove some single fact necessary to his case. This discretionary power to vary the general rule, is to be exercised only so far as the purposes of justice plainly require it, and is to be regulated by the circumstances of each case.

But upon the question, whether, as a general rule, the cross-examining party is prohibited from putting a leading question, to a matter not inquired of by the party calling him, on his examination in chief, there is a diversity of opinion. It was held by Mr. Justice Washington, that such question could not be put. (*Harrison v. Rowan*, 3 Wash. C. C. R., 580.) This is a very respectable authority and entitled to great consideration. But in the case cited, the nature of the question, and the circumstances under which it was put, are not stated, no argument was had, and no authority cited. The same view seems to have been taken by the Supreme Court of Pennsylvania. (*Ellmaker v. Buckley*, 16 Serg. & Rawle, 77.) But we think the general practice has been otherwise both in England and in this state, and is so laid down by the compilers. (1 Starkie on Ev. (4th Am. Edit.), 131; 1 Phillips on Ev. (6th Edit.), 260.)

There is one authority directly in point, where the objection was taken, and it was decided by Lord Kenyon, at *nisi prius* that such leading question is admissible. (*Dickinson v. Shee*, 4 Esp. Cas., 67.) So, in several recent cases, it has been held that where a witness is called to a particular fact, he is a witness to all purposes, and may be fully cross-examined to the whole case, and no distinction is suggested as to the mode of examination. (*Morgan v. Brydges*, 2 Stark. R., 314; *Rex v. Brooke*, *ibid.*, 472.)

On the whole, the court are of opinion, that the weight of authority is in favor of the right to put leading questions, under the circumstances stated, and that this is confirmed by practice

and experience. It is most desirable that rules of general practice, of so much importance and of such frequent recurrence, should be as few, simple and practical as possible, and that distinctions should not be multiplied without good cause. It would be often difficult, in a long and complicated examination, to decide whether a question applies wholly to new matter, or to matter already examined to in chief. The general rule admitted on all hands is, that on a cross-examination, leading questions may be put, and the court are of opinion, that it would not be useful to engraft upon it a distinction not in general necessary to attain the purposes of justice, in the investigation of the truth of facts, that it would be often difficult of application, and that all the practical good expected from it may be as effectually attained by the exercise of the discretionary power of the court, where the circumstances are such as to require its interposition. As this was laid down as the general rule of law, the court are of opinion, that upon this ground, the plaintiff, if he shall be so advised, is entitled to have a new trial.

CHEENEY v. ARNOLD.

Supreme Court of New York, 1854.

[Reported in 18 Barb., 434.]

The judge has a discretionary power to permit leading questions to be put to a witness on direct examination so far as justice plainly requires under the circumstances of the case.

So held where the draftsman of a will had in the course of years become so blind that he could not scrutinize the writing.

The plaintiffs, to maintain their action, proved title to the premises in question in Charles Harris at the time of his death; that he died in the year 1828, leaving Betsy Harris, his widow, and Phila Cheeney [plaintiff], his only child, him surviving; that the widow had since married a Mr. Pike, and that the defendant had lived on said premises nearly twenty years. After making this proof the plaintiffs rested.

The defendant, in order to establish the last will and testament of Charles Harris, deceased, introduced the testimony of

Cheeney v. Arnold, 18 Barb., 434.

Barnabas Brown, taken conditionally, after first proving that the witness was about ninety years of age, and so infirm as to be unable to attend the trial. It appeared by the testimony of the witness, that he had lived in the town of New Berlin for the period of about fifty years; that he was nearly blind; that he was acquainted with Charles Harris in his lifetime, and wrote his last will and testament for him, and saw him sign it and witnessed its execution, with Mr. De Long and Mr. Steere; that he wrote the will according to the directions of the testator, and read it over to him as he wrote it; that the witnesses subscribed their names in the presence of the testator and in presence of each other. It appeared that the witness De Long was dead.

Questions put to the witness Brown were objected to by plaintiff, as leading, the answers nevertheless being admitted.

At *Circuit*, verdict was rendered for the defendant.

Plaintiff appealed on several grounds, among them, the permitting of leading questions to be put to the witness Brown.

The *General Term* affirmed the judgment.

CRIPPEN, P. J. [*after stating the facts*]: No error was committed by the defendant's counsel in the manner of putting questions to the witness Barnabas Brown, under the circumstances of the case. Length of years had so far obscured his vision as to render him unable to discover his own handwriting on the paper containing it. It was therefore entirely legal and proper to direct his attention to the will and to the fact that he had written it for Mr. Harris, and also to all the principal facts ordinarily occurring upon the transaction of such business. It was not pretended that the witness was merely imbecile, or that he was not fully competent to comprehend the force and effect of the questions put to him; he could not look at and discern the instrument; he could not, from an examination of it, know or ascertain the names of, or who were the attesting witnesses to its execution; nor could he discover the manner and form of execution of the testator. Under such circumstances it was not improper to allow questions in a leading form to be put to the witness, in the manner adopted in this case.

People v. Mather, 4 Wend., 229.

Where a witness has become blind, a writing may even be read over to him to refresh his recollection. (1 Greenl. Ev., § 439.) Leading questions are permitted, even in a direct examination, where an omission in the witness' testimony is evidently caused by a want of recollection, which a suggestion may assist. (*Id.* § 435.) It is within the discretion of the judge, at the trial, under particular circumstances, to permit leading questions to be put to a witness. This discretionary power to vary the general rule should be exercised only so far as the purposes of justice plainly require it; and must be regulated by the circumstances of the case. (*Moody v. Rowell*, 17 Pick., 498.) We do not discover in the case at bar that the judge in any manner abused the discretion vested in him, by allowing leading questions to be put to the witness Brown.

The judge charged the jury, that if the will of Charles Harris was established by satisfactory evidence, it entitled the defendant to a verdict in his favor. The testator devised the farm in question to his wife, with power to sell and convey the same. The whole proof upon the question of the due execution of the will was properly submitted to the jury to pass upon. We have no doubt that the testimony was sufficient to go to the jury, and the verdict in favor of the due execution of the will should not be disturbed.

[*Here followed a consideration of other points not relevant to our present inquiry.*]

Judgment affirmed.

PEOPLE v. MATHER.

New York Supreme Court, 1830.

[Reported in 4 Wend., 229.]

A question is leading which puts into the witness' mouth the words to be echoed back, or plainly suggests the answer desired from him.

Where the witness appears to be in the interest of the adverse party, it is proper to permit the direct examination to take the character of cross-examination in this respect.

A question which relates to introductory matter and is designed to expedite the witness to what is material to the issue, is allowable although it be leading.

People v. Mather, 4 Wend., 229.

Putting a question in the alternative form, does not render it less objectionable as leading.

Putting a question which assumes a fact to be in evidence which is not, is not allowable, even on cross-examination.

Action on an indictment against defendant as a conspirator in the abduction of William Morgan.

Benjamin Wright, a witness, called in behalf of the prosecution, after detailing with much particularity, a conversation with the defendant about the abduction of Morgan, said he had given all the conversation on the occasion referred to, which he could recollect in words or in substance.

The public prosecutor then proposed to ask the witness, *whether or not he, in substance or effect, addressed the defendant as one of those concerned in the transaction.*

This question being objected to and overruled, it was varied, and the witness was asked *how he addressed the defendant in respect to his being one of the persons concerned.*

This question was also objected to and overruled, exceptions being taken to both decisions.

At *Circuit* the defendant was acquitted, and the prosecution moved for a new trial.

The *Supreme Court at General Term* denied the motion for a new trial.

MARCY, J. [*considering the questions put to the witness, Wright*]: Considerable discretion is left to a judge who presides at a trial to regulate and control the examination of witnesses, and this court are cautious to avoid encroaching upon the proper exercise of this discretion. If, however, an established rule of law has been violated, the party injured has an undoubted right to relief, and the court feel no reluctance in such a case to grant it.

It is a mistake to suppose that such only is a leading question, to which yes or no would be a conclusive answer. A question is leading which puts into a witness' mouth the words that are to be echoed back, or plainly suggest the answer which the party wishes to get from him. (1 Stark. Ev., 124). It is often a matter of extreme difficulty to distinguish such questions as ought not to be tolerated because they are leading, from those which,

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though in their form leading, are in effect only calculated to draw the mind of the witness to the subject of inquiry.*

In passing on these questions, the court are to regard in some measure the inclinations of the witnesses as well as the subject matter to which the question relates. If it is apparent that the witness is in the interest of the adverse party, the court will be justified in going so far as to permit the direct examination to take the character of a cross-examination. If the question relate to introductory matter, and be designed to lead the witness with the more expedition to what is material to the issue, it is captious to object to it, even if it be leading. The pernicious influence of leading questions is most felt and to be feared when the object of inquiry is, to ascertain the details of a conversation, admission or agreement; and therefore more rigor is called for and justified in confining the direct examination in such cases to its appropriate rules. There is an essential difference between a direct examination and a cross-examination; and the court ought not, except in peculiar cases, to permit the former to assume the character of the latter. The grounds on which the judge proceeded in overruling the questions proposed to be put to the witness, Wright, must have been, I presume, that they were leading, or that the party by whom he was called were subjecting him to a cross-examination. It is quite evident that the witness' memory as to the conversation was exhausted before those questions were proposed. The first appears to me to be a leading question. I consider it no more nor less than asking the witness if he addressed the defendant as one of the abductors of Morgan. This seems to me to be very similar to asking a witness, after he had testified to all he knew as to the contents of a letter, if it had in it anything about the writer being offered a certain price for a special article of merchandize. Such a question is admitted by

*In *People v. Parish*, 4 Denio, 153, where an indictment for cheating by false pretences, alleged that the defendant had falsely represented one Miner of the town of Pike, to be responsible for a sum of money, it was held, that for the public prosecutor to ask a witness examined for the prosecution this question, though objected to as leading: "Had Miner absconded from Pike in July, 1842?" was improper for the reason stated in the objection, it plainly suggesting to the witness the answer desired from him by the district attorney.

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Lord Ellenborough to be a leading one. (*Courteen v. Touse*, 1 Campb., 43.) The question in that case was allowed to be put to the witness by the party calling him, but it was for a particular reason which does not exist in this case. If the question put to Wright had been in the direct instead of the alternative form, it would clearly have been exceptionable; but by putting it in the alternative, the effect of it was not changed. As it was, it plainly suggested to the witness the answer which the party wished to get from him. It therefore conformed to the very definition of a leading question.

After the question was overruled it was varied, and so varied, I think, as to assume the fact as true, which it was the object of the question to prove. It assumed that the witness did address the defendant as one of the persons concerned in carrying off Morgan, and only asked him to tell the manner of the address. In this respect I hold the second question objectionable. Even on cross-examination it is not allowable to put a question which assumes a fact proved which is not. (1 Stark. Ev., 133.)

If I had serious doubts as to the correctness of the judges' decisions on these questions I should feel inclined to hesitate before granting a new trial. There should be a reasonable expectation that something will be gained by a further examination of the witness; such an expectation can scarcely be indulged here. It is conceded that the witness in this case was intelligent, and it was not pretended that he manifested the least reluctance to disclose whatever he knew; his memory was exhausted as to the details of his conversation with the defendant, so much so that he declared he had stated in words or in substance all he could recollect. The experiment of submitting such a witness to a sifting cross-examination holds out but a faint hope that more truth would be elicited from him; but the right thus to examine him does not exist in this instance.

[*Here followed a discussion of other questions, not relevant to our present inquiry.*]

Motion for new trial denied.

NOTE.—In *Williams v. Eldridge*, 1 Hill, 249, the third direct interrogatory annexed to the commission was as follows: "Look upon the annexed account marked B., and declare how and which of said articles, mentioned

[Roy v. Targee, 7 Wend., 359.]

in said account, were sold and delivered by the said plaintiffs to the defendant?" To which the answer was thus; "I have examined the annexed account marked B., and from the defendant's own acknowledgment, he bought and received from the plaintiffs all the articles therein charged." The fourth and fifth direct interrogatories were as follows:

"Is the account correct, and is it a true copy and extract from the mercantile books of said plaintiffs?"—"Did you exhibit a copy of the account to the defendant, and did he admit it to be correct?" To each of these, the witness answered affirmatively, giving dates, circumstances, &c.

The Court, COWEN, J. [*as to this question said*]: The account was properly put in the hands of the witness; for, the object of the interrogatories was to prove, among other things, that the defendant had acknowledged its correctness.

But we think the court erred, in deciding that the interrogatories were proper to be put to the witness. It is scarcely denied that they were leading, being calculated throughout to instruct the witness in what the plaintiffs desired him to answer.

Judgment reversed.

ROY v. TARGEE.

New York Supreme Court, 1831.

[Reported in 7 Wend., 359.]

It rests in the discretion of the judge, to require the counsel to state the substance of the evidence about to be offered by him, so as to enable the judge to determine as to its materiality and relevancy; and the exercise of such discretion is not to be revised by a court of review.

Certiorari to General Sessions of New York. An order of filiation having been made and appealed from, the counsel for the appellant on the hearing of the appeal called several witnesses. The court required him to state what he expected to prove by them, so that they might judge of the materiality of the evidence proposed to be given, and he refusing so to do, except in general terms, the court refused to have the witnesses sworn.

The Supreme Court affirmed the order of the General Sessions.

NELSON, J. [*on the point in question*]: As to the refusal to hear the testimony offered, the sessions, from the belief that there was a disposition to protract unnecessarily the examination on the part of the appellant, called on his counsel to state to them the substance of what he intended or expected to prove. This

Lansing v. Coley, 13 Abb. Pr., 272.

the counsel declined, and the court refused to hear the witnesses until he did ; the counsel did not decline to comply with the order of the court on account of his inability to do so, and it is stated in the return that all the witnesses thus offered, had been examined before the justices. It undoubtedly rests in the discretion of every court, in the trial of causes, to require of the counsel to state the substance of the evidence about to be offered by him. The reason of the rule is obvious, it is to ascertain whether the evidence is competent and pertinent to the issue or issues to be tried, and thereby prevent the introduction of irrelevant and improper testimony, and to facilitate the trial. In the sound exercise of this discretion, courts should always listen to reasons offered for not making a full disclosure before the examination, and give them their due weight. Many times it is unadvisable to apprise the witnesses about to be examined of the facts expected to be proved ; the counsel may not be sufficiently advised of the facts himself—these or any other sufficient reasons for not enforcing the rule, the court take upon suggestion of counsel. In this case no sufficient, nor indeed any reasons whatever, were given by the counsel for withholding from the court the facts expected to be proved by the witnesses, and we therefore think the sessions were right in rejecting them.

NOTE.—As to general offers see *Pepin v. Lachenmeyer*, 45 N. Y., 27 ; and *Tochman v. Brown*, 33 New York Super. Ct. (J. and S.), 409, 413, 421.

LANSING v. COLEY.

New York Supreme Court, Third District; General Term, 1860.

[Reported in 13 Abb. Pr., 272.]

An answer to an interrogatory, under a commission, which is not responsive to the interrogatory, may be objected to by either party on the trial,* and must be excluded.

The action was brought upon several promissory notes indorsed by the defendant. The answer which was verified, denied notice of dishonor. A commission was issued for the examination of a

* By the present practice in respect to depositions, the remedy in such cases is to move before trial (*Fassin v. Hubbard*, 55 N. Y., 465).

Lansing v. Coley, 13 Abb. Pr., 272.

witness, who had been a partner with the plaintiff; and to an interrogatory of the defendant asking when the partnership was dissolved, and under what circumstances, the witness answered, "There has never been any regular dissolution-papers drawn up, except when I got into trouble and then the plaintiff brought me a paper to sign, so it could be published that we had dissolved partnership." On the trial the plaintiff objected to this answer, and it was excluded.

R. A. Parmenter for appellant, insisted that only the party asking a question of a witness can object if the answer is not responsive.

J. Romeyn and A. B. Olin, for respondent.

By the Court: GOULD, P. J. (HOGEBROOM and BOCKES, JJ.) The only question in this case which is of general importance, arises upon the defendant's exception to the exclusion of part of an answer to the seventh interrogatory put to William Lansing. The excluded part of the answer is plainly—and the defendant's counsel in his argument concedes it to be—not responsive to the interrogatory, but he says that the party putting the question is the only one who can object to the answer on that ground. That is to say, a party who knows that he has a willing witness, can shape his interrogatory so as to touch an entirely proper matter; and one about which the opposite party has no desire to propose a cross-interrogatory, and after answering what is asked, the witness can volunteer an entirely distinct piece of evidence, not even hinted at in the question, and the party to be injured by it is not at liberty to object to the evidence so impertinently, and it may well be fraudulently put in. The claim is too bald to be entertained for a moment. The ruling at the circuit was clearly right.

[*Rulings on other points are omitted.*]

Judgment affirmed.

NOTE ON THE RULE THAT A WITNESS MUST TESTIFY TO FACTS, NOT CONCLUSIONS.

Considered with respect to mental certainty, there are three qualities or classes of testimony :

1. Testimony to having observed perceptible facts. The foundation of this is perceptive knowledge, and this knowledge of a fact, once acquired, should be certain and unchangeable, although fading with the lapse of time. This includes observations which involve some exercise of judgment, if its exercise was in the very act of observation, as distinguished from a resulting process of deduction. But the law recognizes and makes due allowance for the existence of fertile sources of deception of the senses, such, for instance, as the influence of great fear, or the optical illusion as to which of two vehicles or vessels, on one of which the witness was, was in motion, etc. See *The Ship Marcellus*, 1 Black, 418; *McNally v. Meyer*, 5 Ben., 239; *The Laura*, 14 Wall., 343.

2. Testimony to matter of opinion, whether of skill or experience, *i. e.*, whether it be that of scientific experts, or that of common experience in the daily affairs of life upon which ordinary witnesses may speak, such as whether a person was intoxicated, or whether a couple were sincerely attached to each other. See cases following.

3. Belief or inference, such as the mind forms by its own secondary processes. This the law recognizes as uncertain; not only easily simulated by a dishonest witness, and difficult, if not impossible, to be tested; but fluctuating and reversible in the mind of an honest witness, by process of reflection without new knowledge, and the constant production of even unnoticed shades of mental derangement. All mental delusions are of this class. The law excludes all testimony of this class with two exceptions: 1. Belief or inference may be competent where the intent of the same person is material. See, for instance, *Hamilton v. People*, 57 Barb., 625; *Goodman v. Stroheim*, 36 Super. Ct. (J. & S.), 216; *Farnam v. Feely*, 56 N. Y., 451. 2. In some cases the belief or impression produced on a witness' mind at the time of the occurrences to which he speaks, is admitted as giving the necessary and proper color to his testimony to the occurrence, as circumstantial evidence. See, for instance, *Fraser v. Fraser*, 5 Notes of Ec. Cas. 11, 34; *Faussett v. Faussett*, 7 Notes of Ecc. and M. Cas., 88; *Davidson v. Davidson*, 1 Dean and S. Ecc., 132; *s. c.* 2 Jur. N. S., 577. But in both these exceptional classes of cases it is never the present belief of the witness that is received, it is the belief concurrently existing with the incident of which he speaks, or then instantly produced in his mind, and so connected with the incident as to form, so as to speak, the mental part of the *res gestae*.

Notes of Cases on General Rule.

The present belief of a witness, sometimes inquirable into on cross-examination, is heard, not because it has any competency on the issue, but, if at all, because it is a proper mode of probing the mind of the witness and testing his capacity and consistency. But even the fact that a witness has at different times expressed contradictory opinions as to the guilt or innocence of the one who is accused does not involve any very serious impeachment of credibility as to the tangible facts testified to. (*Atkinson v. Atkinson*, 2 Addams, 484.)

The distinction between "impression," or uncertain recollection of facts and belief or inference, is one of kind, not of degree. The former is faint or partly obliterated memory, and is competent; the latter is a secondary mental impression by deduction and is not competent (unless in the cases stated above), however distinct and positive. See *Clark v. Bigelow*, 16 Me., 246; *Humphreys v. Parker*, 52 *id.*, 502; *State v. Flanders*, 38 N. H., 342.

NOTES OF CASES ON THE GENERAL RULE; OPINION AS TO ORDINARY AFFAIRS.

Alabama: *Brinkley v. State*, 89 Ala., 34; s. c. 8 Southern Rep., 22 (on trial for homicide, a witness cannot testify that a dance in which deceased was engaged was indecent). *McCalman v. State*, 1893, 11 Southern Rep., 408 (a witness cannot state his conclusion whether or not a room in which gambling was carried on, was or was not a private bedroom). *Connecticut*: *Spencer v. N. Y. & New Eng. R. Co.*, 62 Conn., 242; s. c. 25 Atlantic Rep., 350 (testimony that the use of land adjoining a railway station by the public was a convenience and necessity is competent upon an issue whether such land constitutes a part of a public way where the witness is familiar with the location and knows the needs of the public). *Georgia*: *Dowdy v. Georgia R. Co.*, 88 Ga. 726; s. c. 16 Southeast. Rep., 62 (a witness cannot testify that the engineer had time to blow the whistle before the deceased was struck, nor can he be asked whether the engineer had time to signal the approach of the engine, and if he had done so whether the deceased would not have had time to get off the track). *Illinois*: *Chicago, etc. R. Co. v. Legg*, 32 Ill. App., 218 (a witness may testify whether an animal's tracks indicated that it had been running). *Illinois Cent. R. Co. v. People*, 1893, 33 Northeast. Rep., 173 (a witness cannot testify that a train is a regular passenger train). *Indiana*: *Ohio & M. R. Co. v. Wrape*, Ind. App., 1892, 30 Northeast. Rep., 427 (one, who has examined the conditions along a track after cattle had been killed and has testified in reference thereto, may be permitted to give his opinion as to the direction in which the animals were going when they were struck). *Iowa*: *Dunham v. Rix*, 1893, 53 Northwest. Rep., 252 (a non-expert cannot testify as to the condition of a stallion when it was tended back because it did not comply with the warranty under which it

 Note of Cases on General Rule.

had been sold). *Maryland*: Baltimore & Turnp. Road v. State, 71 Md., 573; s. c. 18 Atlantic Rep., 884 (a witness cannot give his opinion, based on the testimony of other witnesses, as to whether a wagon load of wood is calculated to frighten a well-broken horse). *Michigan*: Geveke v. Grand Rapids, etc. R. Co., 57 Mich., 589; s. c. 24 Northwest. Rep., 675 (a driver is competent to testify as to what frightened his horses). *McNally v. Colwell*, 91 Mich., 527; s. c. 52 Northwest. Rep., 70 (in an action to recover for loss from a fire communicated from an adjacent lumber mill, the opinion of a witness as to the sufficiency of appliances to put out fire, provided at defendant's mill, is incompetent). *Minnesota*: Williams v. Clark, 47 Minn., 53; s. c. 49 Northwest. Rep., 398 (a witness cannot give his opinion as to whether a written instrument was executed at a recent or remote time, when based upon its appearance). *Mississippi*: Louisville, etc. R. Co. v. Natchez, etc. R. Co., 67 Miss., 399; s. c. 7 Southern Rep., 350 (a witness cannot give his opinion whether cotton would have been burned if it had been loaded on a box car instead of a flat car). *Nevada*: McLeod v. Lee, 17 Nev., 103; s. c. 28 Pacific Rep., 124 (a witness, familiar with a dam and its surroundings, may testify that it was the cause of an overflow). *New York*: People v. Fanshawe, 19 N. Y. Supp., 865 (a witness may testify whether a bed appeared as though someone had been recently sleeping in it). *Dunn v. Ultsch*, 2 Misc. R., 211; s. c. 21 N. Y. Supp., 262 (where misappropriation of money from defendant's cash register is set up in an action for wages, defendant cannot be asked whether the register was an accurate machine). *North Carolina*: Hopkins v. Bower, 111 N. C., 175; s. c. 16 Southeast. Rep., 1 (a witness, who has had an opportunity of seeing and knowing a person, may testify as to whether she had negro blood). *Pennsylvania*: Kehler v. Schwenk, 151 Pa. St., 505; s. c. 25 Atlantic Rep., 130 (other boys, similarly employed, may testify whether a boy of plaintiff's size could have detached a car while standing outside the rails). *Texas*: Gulf, etc. R. Co. v. Locker, 78 Tex., 279; s. c. 14 Southwest. Rep., 611 (a non-expert may give his opinion as to the cause of the overflow of a river where he has apparently stated all the facts upon which his opinion is founded). *International, etc. R. Co. v. Kuehn*, Tex. Civ. App., 1893, 21 Southwest. Rep., 58 (a non-expert witness cannot testify as to whether a train could have been stopped in time to prevent an accident if it had been running slower). *Galveston, etc. Ry. Co. v. Daniels*, 1 Tex. Civ. App., 695; s. c. 20 Southwest. Rep., 935 (a non-expert cannot testify as to the sufficiency of timbers to support a bridge). *Jackson v. State*, Tex. App., 1891, 16 Southwest. Rep., 247 (a non-expert, who has seen several human skeletons, may testify whether certain bones were those of a child, though on cross-examination he testifies that he has never seen the bones of various small animals and did not know the difference between them and those of a child). *United States*: St. Louis, etc. Ry. Co. v. Bradley, U. S. Cir. Ct. App., 1893, 54 Fed. Rep., 630 (a witness may testify as to the effect of a bridge and embankment in causing an overflow, where he has resided in the neighborhood and experienced several overflows).

NOTES OF RECENT CASES ON TESTIMONY AS TO
BELIEF AND RECOLLECTION.

Alabama: *Alabama, etc. R. Co. v. Hill*, 93 Ala., 514; s. c., 9 Southern Rep., 722 (a witness' testimony that, to the best of his judgment, a rail was broken at a certain place, but that he would not be positive, is but a statement of the witness' best recollection, and is properly received). *Keller v. Taylor*, 90 Ala., 289, s. c. 7 Southern Rep., 907 (where there is a doubt as to whether a witness is attempting to repeat what another told him or is merely trying to express his opinion or inference formed from what was said to him, his testimony should be rejected). *Montgomery, etc. R. Co. v. Malette*, 1891, 9 Southern Rep., 363, it is not error to exclude a mere conclusion by a witness that all the passengers were out of a railroad car before it was overturned, which is based on facts stated by him and not upon his recollection. *California*: *Prior v. Diggs*, 1893, 31 Pacific Rep., 155 (a witness is not required to give his testimony with absolute positiveness; it is not necessarily a mere expression of opinion where his testimony is prefaced with such statements as, he does not consider, or, does not think, etc.) *Missouri*: *State v. Duncan*, 1893, 22 Southwest. Rep., 699 (a witness' having testified that he saw an act done, may be asked as to whether he has any doubt as to its commission as he has described it). *Pugh v. Ayers*, 47 Mo. App., 590 (testimony by a witness as to his impression is not competent unless it appears that what he terms his impression is really a recollection). *North Carolina*: *People v. Teague*, 106, N. C., 576; s. c., 11 Southeast Rep., 665 (a witness is competent to testify as to a fact of which he says he is reasonably certain; it is not necessary that his recollection should be so exact as to exclude all doubt). *Texas*: *Harris v. Nations*, 79 Tex., 409; s. c., 15 Southwest Rep., 262 (where a witness has been in the position to know the facts, but his memory has grown dim, what he thinks his recollection is, is admissible in connection with other testimony). *Snell v. State*, 29 Tex. App. 236; s. c., 15 Southwest. Rep., 722 (it is not error to refuse to allow a witness to testify that a deceased person made statements in his hearing different from his dying declarations which have been given in evidence, where the witness is unable to state the substance of the variant statements). *Jones v. State*, 30 Tex. App., 426; s. c., 17 Southwest, Rep., 1080 (suspicions are not proper evidence).

Morehouse v. Mathews, 2 N. Y., 514.

MOREHOUSE v. MATHEWS.

New York Court of Appeals, 1849.

[Reported in 2 N. Y., 514.]

The general rule is that witnesses must be confined to the communication of facts, not *opinions*, nor conclusions which they may have formed from facts even known to themselves.

The exceptions to the general rule are confined to questions of science, trade and a few others of the same nature.

Sherman Morehouse sued James E. Mathews in a justice's court for breach of contract by which defendant had undertaken certain services, etc., including the keeping of plaintiff's cows and feeding them on hay of good quality then in his barn and of which he had shown plaintiff a sample.

The complaint alleged that defendant fed them on stack hay which was weather-beaten and otherwise injured, and entirely unfit for feeding, whereby the cattle became poor and valueless.

After a witness had testified to the contract, and that defendant had fed hay of an inferior quality to plaintiff's cattle, plaintiff asked the witness "What damage accrued in consequence of feeding the cattle upon the stack hay and not upon the hay in the barn as agreed?" Objected to by defendant on the ground, "that the witness cannot give his opinion, but must give facts."

The objection was overruled, and the witness answered that he thought the damage would be fifty dollars.

Another witness over same objection was allowed to give a similar opinion that he thought the damage would be \$67.

The Justice gave judgment for plaintiff for \$25 damages, with costs.

The County Court affirmed the judgment.

The Supreme Court at General Term reversed the judgment without opinion. The plaintiff brought error.

M. Grover, for plaintiff in error, argued that in a case like this, where the witnesses appeared to be farmers, saw the cattle and

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were acquainted with the keeping of cattle, and the facts could not be so presented as to enable the court to pass upon the question, the opinion was competent.

Norton & Wetherly, for defendant in error.

The Court of Appeals affirmed the judgment of the Supreme Court.

SHANKLAND, J. The question propounded to the witness seems to have been understood by the defendant, and by the witness himself, to call for his opinion as to the amount of damages, rather than to the fact whether damage accrued, and the character of it, as the language of the interrogatory would more properly imply. What damage accrued in consequence of feeding cattle upon poor hay, instead of good hay, called for no opinion of the witness, but for a specification of facts, as its legitimate response; and the question put to the witness in this case, was strictly legal. But the defendant and the witness understood it to call for the opinion of the latter as to the amount of damages sustained by the plaintiff, and it is very probable the plaintiff asked the question with that object in view, as he did not explain, after the specific objection was interposed by the defendant, nor repudiate the answer of the witness after it was given. We should therefore pass upon the admissibility of the question put, in the same way as we would if it had been in the following form: "How much, in your opinion, was the damage sustained by the plaintiff, in consequence of feeding the cattle upon the poor hay instead of that agreed upon?"

If the interrogatory had been propounded in the form above indicated, it would have been clearly inadmissible within all the authorities. The general rule upon the subject is, that witnesses must be confined to the communication of facts, and not opinions or conclusions which they may have formed from facts, whether known to themselves, or derived from the testimony of others. It is the special duty of the jury to draw conclusions, and not of the witness. (1 Phil. Ev., 290.) The exceptions to the general rule are confined to questions of science, trade and a few others of the same nature, but cannot be extended to a case like the one under discussion. It is allowable for a witness who deals in, or

is acquainted with, the value of cattle, or horses, to testify as to the value of such animals, because he then speaks of facts as derived from the market price of such property. In such a case, his testimony would not be opinion, it would be knowledge. In the case before us, the witness could have legally testified to the degree of inferiority of the hay fed to that agreed to be fed by the defendant. He could also have testified as to the condition of the cattle when brought to the defendant's, and when taken away, and to any other fact calculated to enable the court or jury to form a just opinion on the question of damages; but the mere opinion of the witness on the amount of damage was entitled to no weight. If the witness had testified that he was acquainted with the value of cattle, I think he might have been allowed to state how much less valuable these were when taken away than when driven to the defendant's, in consequence of the inferior quality of the food. But then he should state the facts upon which he founded his valuation, so that the jury might be able to appreciate his estimate at its just value.

A few adjudged cases will show the strictness with which our courts have held to the rule which excludes the opinions of witnesses, unless they fall within the exceptions to the general rule. In *Paige v. Hazard & Kelley* (5 Hill's R., 603), it was held that a witness, who testified that he was a boatman and knew the boat which had been sunk by defendant, previous to her being injured; that he had raised sunken boats, and caused them to be repaired; could not be permitted to testify what the damage would be, from the description of the situation of the boat as given by the witnesses. In *Dunham v. Simmons* (3 Hill, 609), which was an action for damages for injuring a horse by overdriving, a witness having described the condition of the horse after the injury complained of, was asked what amount of damages had been sustained in consequence of ill usage? And it was held that the question was inadmissible, if it had been objected to on the proper ground. (See also *Norman v. Wells*, 17 Wend. R., 136; 13 *id.*, 81; 23 *id.*, 425; 4 Denio, 312; 23 Wend. R., 354.) In the case last cited, which was an action to recover damages for killing a setter dog, a majority of the court thought it barely competent to allow a witness who was ac-

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quainted with such animals and their value, to testify to such value. In the case at bar, the witness should have been confined in his testimony to questions of fact, such as the number, condition and value of the cattle kept by the defendant, the quality of hay used in comparison with that agreed for, the effect the poor hay produced upon the cattle, and thus have laid a foundation of facts from which the jury or justice could have formed an opinion of the amount of damages actually sustained. The judgment of the Supreme Court should be affirmed.

NICOLAY v. UNGER.

New York Court of Appeals, 1880.

[Reported in 80 N. Y., 54.]

The issue being whether a sale of a bond was made by defendants, or the bond merely delivered by them on the order of a third person alleged to be the real owner and seller, it is not competent for defendants to ask the person who acted in the transaction, "Did your firm ever sell the bond to plaintiff?" for this calls for construction rather than fact.

Action to recover money paid for a bond alleged to have been sold to plaintiffs by defendants and subsequently discovered to be a forged bond. The question litigated was whether defendants were the sellers, or whether, as they claimed, they were only pledgees, and delivered it on the owner's order on payment of their lien.

On the trial, one of defendants' witnesses was asked by defendants' counsel the following questions.

"Q. Did your firm ever sell the bond to Mr. Nicolay?

Objected to; objection sustained; defendants excepted.

Q. Did you ever sell the bond to Mr. Nicolay or to anybody else?

Objected to; objection sustained; defendants excepted.

Q. Were you and Charles Unger & Co. ever directed by the owner to sell any of these bonds?

Objected to upon the ground that that is a question of law; objection sustained; defendants excepted."

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R. Duncan Harris, for plaintiffs.

Learned & Warren, for defendants.

Judgment was entered on a verdict, for the plaintiffs.

The *Supreme Court at General Term* affirmed the judgment.

INGALLS, P.J. [*as to exclusion of questions below*]: "It will be perceived that these questions were not in regard to some collateral subject but bore upon the direct issue which was being tried, which involved a mixed question of law and fact. In such a case the witness must be required to state the conversation and leave the jury to deduce the inference therefrom.

The instructions from the owner of the bonds, if at all material under the facts of the case, should have been detailed, to enable the court and jury to determine the effect to be given thereto, and the precise language employed might be all important."

The *Court of Appeals* affirmed the judgment.

MILLER, J. [*after reviewing the facts*]: The question put to one of the witnesses for the defendants, inquiring whether the firm ever sold the bond to Mr. Nicolay, as well as the other two questions of a similar character and embodying the same idea substantially, were, we think, properly overruled, for the reason that an answer to each of them called for a construction which the witness would place upon the facts which took place or his opinion in reference to the same. The witness had stated the facts within his knowledge, and the questions put called upon him, in the place of the jury, to determine what the contract was. The questions related to the main issue to be tried, whether there was a sale by the defendants to the plaintiffs. The witness had stated the conversation and the facts of which he had knowledge, and it was for the jury to draw the inference to be derived from his evidence. The defendants would receive all the advantage which would flow from the evidence given in regard to what transpired between the parties, and it would not add to its weight or increase its effect by proof of the conclusion of the witness. Its rejection, therefore, would not prejudice the defendants or furnish any ground for a new trial.

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We have been referred to some reported decisions which are claimed as establishing that the questions put were competent; but a careful examination of the principal cases relied upon evinces that they are not analogous. It is not difficult to see that it is entirely competent to prove under some circumstances as a fact what under others might be regarded as a mere conclusion of law and would be clearly inadmissible. There are cases which hold that where the question involves a fact clearly within the knowledge of the witness, and not the expression of an opinion upon facts proven, it is admissible. (*DeWolf v. Williams*, 69 N. Y., 621; *Knapp v. Smith*, 27 *id.*, 277; *Sweet v. Tuttle*, 14 *id.*, 465; *Davis v. Peck*, 54 Barb., 425.) But in these cases the testimony does not, as in the case before us, present the transaction and involve the construction of the facts proved by the witness himself. The decisions are numerous. that such evidence, when the whole issue in the case turns upon it, is incompetent. (See *Miller v. L. I. R. R. Co.*, 71 N. Y., 380; *Carpenter v. Eastern Trans. Co.*, *id.*, 574; *DeWitt v. Barley*, 17 *id.*, 349; s. c., 9 *id.*, 371; *Lincoln v. S. and S. R. R. Co.*, 23 Wend., 425.) The question discussed comes very near the border line, and the distinction between the two classes of cases is a close one, so that it is often a matter of discretion, when such is the fact, with the judge before whom the trial is had, to decide as to the right to put questions of this kind; but it would be opening a wide door to allow witnesses to swear as to the construction of a contract under circumstances like those presented in this case. If the defendants could be allowed to testify directly that no sale was made, the plaintiffs could be allowed, for the same reason, to swear that it was; it would leave it for the jury to determine the case upon these opinions of interested or partisan witnesses, and take from the province of the jury the duty of deciding from the facts sworn to. [*Here followed a consideration of other points not relevant to our present inquiry.*]

All concur (FOLGER, J., in result) except CHURCH, C. J., and RAPALLO, J., not voting.

Judgment affirmed.

NOTE.—Where the question was as to whether there was negligence in the handling of a ship, a witness who was on board was asked: “Do you recollect how the weather on that occasion compared with the weather at that season of the year, as to its being rougher or more stormy than usual?”

This was objected to as calling for an opinion.

Held, properly excluded, *Guiterman v. Liverpool, etc., S. S. Co.*, 9 Daly, 119.

Where a question arose as to whether a person was a minor or not, several witnesses, well acquainted with the person were called, and testified that they should think from his appearance that he was between the age of fourteen and the age of seventeen years. The defendant objected to the admission of this testimony as being opinions.

Held, to have been improperly admitted, as it was opinion entirely abstracted from fact. That if the witnesses had testified to the facts indicative of his age and accompanied them with their opinion it would have been competent (*Morse v. State*, 6 Conn., 9).

Where the soundness of a person's mind was in question a witness was asked: “What did you hear him say imputing that anyone had stolen his tobacco?”

This was objected to as asking the witness to construe the language, interpret it and give an opinion to the jury as to the meaning of the words and language.

Held, not error to admit it, *CORFEX, J.*, saying: “It calls for the language of Richard Haxton upon a particular subject, and not for the witness' opinion of the language. *Haxton v. McClaren*, 31 N. E. Rep., 48 Indiana.

Collins v. N. Y. Central, etc., R. Co., 109 N. Y., 243.

COLLINS v. N. Y. CENTRAL, ETC., R. CO.

New York Court of Appeals, 1888.

[Reported in 109 N. Y., 243.]

Questions to a locomotive engineer as to whether his engine discharged as many sparks as another engine furnished with a different stack; and as to which he had observed had discharged most sparks, *Held*, to call for a statement of observation and not for an opinion, and therefore not objectionable.

The plaintiff sought to recover damages from defendant for loss of property by a fire alleged to have been caused by defendant's negligent use of a defective spark-arrester on one of its engines, No. 113. It appeared that near the plaintiff's premises the Erie Railway runs parallel with defendant's road, and that an Erie train passed plaintiff's premises a short time prior to defendant's engine, No. 113. Defendant claimed the fire to have been set by sparks from the Erie engine.

The plaintiff claimed that the spark-arrester on defendant's engine was out of order, and had been negligently allowed to remain so for some time, thus permitting larger sparks to be emitted than could otherwise have escaped, and that the larger sparks remaining alive longer than the smaller ones, caused the fire.

The plaintiff also claimed that the general plan and mode of constructing the spark-arresters used on defendant's road was faulty and inferior to that of other roads, which fact was known to all persons familiar with the construction of engines and conduct of railroad trains. On the trial, considerable evidence was given as to the comparative safety of the two plans for spark-arresters as used, the one on defendant's road, and the other on the Erie Railway, the plaintiff claiming the Erie's to be the better and safer. The defendant called the engineer of engine No. 113 upon the night in question, who testified that he had been an engineer on passenger locomotives for sixteen years; that he carefully examined the spark-arrester of his engine on reaching Niagara Falls and found everything all right. He testified that he was acquainted with the kind of spark-arrester

used on the Erie locomotives, generally described as the Diamond stack.

The main question at issue was, which of these two classes of engines was the more likely to set fires, and that depended partly upon the quantity of sparks emitted by each.

The engineer of No. 113 was asked, on direct examination :

Q. Now, with reference to this engine of yours, state whether or not she discharged as many sparks as the Diamond stack of the Erie ?

Objected to as a conclusion of the witness, and that he should describe what he saw.

Defendant's counsel proposes to show by the witness that one discharges less sparks than the other.

Objected to by plaintiff's counsel. Objection sustained, and exception taken by defendant's counsel.

By the Court—I do not rule that you are not permitted to show his observation as to both.

Q. Have you observed during the three years you run this, after it was changed, and had this style put in, have you observed, and do you know as to whether this engine, or the engines used there upon the Erie road with the Diamond stack, discharged the most sparks ; I ask you whether you know by observation ?

A. I know, sir, by observation.

Q. Which do you say discharges the more sparks ?

Objected to the same as before stated. Objection sustained and exception taken by defendant's counsel.

Again he was asked this question :

“Q. Have you been, all these years that you have been a locomotive engineer, familiar with the various kinds of spark-arresters in use, and are you well acquainted with the Diamond ?” He answered that he was. The following afterward took place :

Q. Have you used the Diamond stack a good many years ?

A. Yes, sir.

Q. Have you observed which sets the most fires ?

A. Yes, sir.

Q. Will you state which ?

Collins v. N. Y. Central, etc., R. Co., 109 N. Y., 243.

By the Court—Do you mean of the two varieties?

Defendant's Counsel—Yes, sir.

Plaintiff's Counsel—I object to it, on the same ground as I stated to the question with reference to the sparks; that he may state what he observed, but not his conclusions.

Objection sustained and exception taken.

By the Court—If he has had any observation as to any particular engine, and had noticed what that engine did, I think it is competent.

Q. You have stated the extent to which you have seen No. 19 throw sparks?

A. Yes, sir.

Q. Have you ever seen 113 throw sparks to that extent?

Objected to same as before. Objection sustained, and exception taken.

The witness also said that he observed a stream of fire and sparks from the Erie stacks every time he got along anywhere near them; that he used to run side by side nearly every day, and at night, for some distance with an Erie engine; that at a particular time at night the two trains would run near together on the two roads, the Erie engine being a little ahead of him, about five or ten minutes. This question was then asked him:

“Q. Now state whether there is any such stream of fire or sparks, or volume of sparks, emitted from engine No. 113?”

Objected to by plaintiff's counsel. Objection was sustained and exception taken.

David Miller, for respondent.

Green, McMillan & Gluck, for appellants.

Judgment was entered upon a verdict for plaintiff.

The *Supreme Court at General Term* affirmed the judgment without discussing this question.

The defendants appealed to the Court of Appeals.

Green, McMillan & Gluck, for appellants, urged that the question was just as competent as it would be to ask whether one thing was larger or smaller than another, or lighter or

heavier, without showing the exact measure or weight of either.

David Miller, for respondent, argued in substance that the result of the comparison was a conclusion of the witness.

The *Court of Appeals* reversed the judgment.

PECKHAM, J. [*after stating the facts*]: We think the trial court erroneously sustained the plaintiff's objections to the above questions. The questions put were proper in that they sought to elicit facts, and not mere opinion. The witness was asked to state whether his engine discharged as many sparks as the Diamond stack of the Erie. This the court held was asking for an opinion, the court stating that the defendant might show this witness' observation, but that he could not give his opinion. He was then asked if he had observed which of the two discharged the most sparks and he stated that he had, and that he knew by observation; and he was then asked to say which discharged the most sparks. This, upon plaintiff's objection, the court excluded. We know of no other way in which the witness could have stated his observation than by answering this question; so of the other two questions. The evidence was upon a very material issue in the case. There were no means of stating the result of the witness' observation other than the determination he came to as to the fact that the one or the other emitted the most sparks, and hence it was proper that he should have been permitted to answer questions of that nature.

If this evidence had been given, it might not have changed the result. But that fact we do not know. It was material and proper evidence, and we cannot say that no harm resulted to the defendant from its exclusion. [*Remarks on another point are here omitted.*]

All concur, except DANFORTH, J., not voting.

Judgment reversed.

Hallahan v. N. Y., L. E. & W. R. R. Co., 102 N. Y., 194.

HALLAHAN v. N. Y., LAKE ERIE & W. R. R. CO.

New York Court of Appeals, 1886.

[Reported in 102 N. Y., 194.]

A statement of facts by a witness without positively affirming its accuracy—*e. g.*, “His elbow was resting on the sill, and I should judge that it could not project out of the window by the position that he held it in the car”—is not incompetent.

It is not error to deny a motion to strike out the part beginning with the words, “I should judge.”

To a question whether the elbow was inside or outside the window, an answer, “It could not be outside; it was probably on the level with the outside; my opinion was from the position that it was inside”—is not improper, except as to the part beginning “My opinion was, etc.”

Confusion among the passengers in a car at the time of an accident is competent as part of the *res gestæ*.

Action for damages for personal injuries alleged to have been occasioned by defendant's negligence while plaintiff was a passenger. His right to recover depended on the simple question whether his elbow was outside or within the window when it was struck by a mail bag crane near the track.

Lewis E. Carr, for Appellant.

D. F. Gedney, for Respondent.

Judgment was entered upon a verdict for plaintiff.

The Supreme Court at General Term affirmed the judgment without opinion.

The Court of Appeals affirmed the judgment.

MILLER, J.: The only questions presented upon this appeal relate to the rulings of the judge in regard to the evidence.

It is insisted by the appellant's counsel that certain testimony of one of the witnesses for the respondent, Daniel Creegan, was incompetent and improper, and that the court erred in refusing to strike out the same. The questions put to the witness were not objectionable, but it is urged that the answers were im-

proper and should have been stricken out, in accordance with the motion made by the appellant's counsel.

The following was one of the questions put to the witness and the answer given: "Q. Just describe the position of his right elbow in reference to that window of the car? A. Mr. Hallahan sat straight up in the seat at the window and his elbow was resting on the sill, and I should judge that it could not project out of the window by the position that he held it in the car."

Defendant's counsel objected to the latter part of the answer commencing at "and I should judge," etc., and moved to strike it out, on the ground that it was a conclusion and not a statement of fact, which motion was denied and defendant excepted. The witness was also asked: "Q. Was or was not his elbow, at the time this object struck the car, inside or outside the car window?" to which he answered, "It could not be outside the car window; it was probably on a level with the outside of the car; my opinion was, from the position, that it was inside." Counsel for the defendant objected to this answer, and moved to strike it out, on the ground, that it was the opinion of the witness and not a statement of fact, and the motion was granted as to the part "my opinion," etc. Defendant's counsel excepted to the refusal to strike out the remainder of the answer.

The objection to the first answer was upon the ground that it gave witness' opinion as to the position of the plaintiff's elbow, which would have been inadmissible if it had been asked for by a question put for that purpose. The witness had described the position of the plaintiff's arm, and his expression, "I should judge," was qualified by what he had previously stated and by what he stated afterward. It was a simple statement of the facts as they actually existed, with the qualification that in the position his arm was, it could not project out of the car window. It was merely a careful statement of the facts without a positive allegation as to its accuracy, and not in the nature of an opinion alone. It may be regarded as the statement of a witness who is extremely cautious in giving evidence. The expression used and others of a similar character, such as "I think," when the facts are presented, cannot always be regarded as a mere opinion. Cases frequently arise where witnesses are called upon to state

Hallahan v. N. Y., L. E. & W. R. R. Co., 102 N. Y., 194.

the appearance of a person at a particular time, when a question arises as to the soundness of his mind; and when the facts are stated, the witness can properly be allowed to testify as to such appearance in a manner which to some extent involves the judgment of the witness.

Within this rule we think the answer given to the first question was not objectionable. But even if the evidence may be regarded as calling for an opinion in any way, as the testimony was based upon the personal knowledge of the facts, we think it may be considered as competent. (*Blake v. People*, 73 N. Y., 586.)

The cases relied upon by the appellant's counsel are not adverse to the rule laid down. The remarks we have made will apply to the answer given to the second question. The objectionable part of that answer was stricken out and what remained was proper testimony based upon the fact previously stated that the witness saw the position of plaintiff's elbow.

Another witness on the trial testified that he was sitting in about the middle of the car on the right hand side, and at this point there was a rattling noise which appeared to be on the same side; that the people looked around, apparently wondering what the trouble was; that he noticed a commotion in the forward part of the car; that he went there and saw that plaintiff was hurt. He was then asked: "Did you notice any confusion produced among the passengers by the noise on the outside of the car?"

The question was objected to on the ground that it was immaterial and improper. Objection overruled and an exception taken.

We think the plaintiff had a right to prove all the circumstances attending the accident as a part of the *res gestae* and to show that others in the car heard the noise of the collision of the crane with the car, the confusion being the result of the collision and showing the nature thereof. Similar testimony was given by other witnesses without objection. The evidence was we think admissible.*

*In a prosecution for disturbing a meeting, it has been held that a witness could not testify directly that the meeting was disturbed; for that was a question for the jury. *Morris v. State*, 84 Ala., 457.

We are not at liberty to review the questions of fact presented by the evidence upon the trial, and the verdict of the jury is conclusive in regard to them.

The judgment should be affirmed.

All concur.

Judgment affirmed.

NOTE.—In an action for negligently causing the death of A, the defendant to show negligence on the part of of A, asked a witness: "Did he not have time to jump after he saw the train?" Objected to as calling for an opinion.

Held, admissible; that it was matter of fact discernible by judgment or estimate.

Quin v. N. Y., N. H. & H. R. R. Co., 12 Atl. Rep., 97 (Conn.).

In an action against a railroad company for personal injury caused by defendant's steam-shovel, the operator of the shovel was allowed to testify that "no human force could have prevented the lever, or bucket, from swinging around to its accustomed place." Objected to as an opinion of the witness.

Held, admissible; that it was a summary of a number of involved facts; that it was the statement of "the result of personal observation and knowledge as to a collective fact."

Alabama G. S. R. R. Co. v. Yarbrough, 3 So. Rep., 447 (Ala.).

NOTES OF OTHER RECENT CASES ON TESTIMONY TO DISTANCE, SIZE, QUANTITY, SPEED, ETC.

Alabama: *Kansas City, etc., R. Co. v. Crocker*, 1892, 11 Southern Rep., 262 (a witness may testify that a hand car was going faster than a man could run). *California*: *Posachane Water Co. v. Standart*, 97 Cal., 496; s. c. 32 Pacific Rep., 532 (a non-expert's opinion as to grade of a ditch per mile admissible). *Indiana*: *Bohr v. Nevenschwander*, 120 Ind., 449; s. c. 22 Northeast. Rep., 416 (a witness who has examined a creek cannot testify as to whether it appears to have sufficient fall to drain the premises in controversy). *Romack v. Hobbs*, 1893, 32 Northeast. Rep., 307 (a statement that a repaired ditch was wider and deeper than the original ditch is a statement of fact and not an opinion). *Iowa*: *Pence v. Chicago, etc., R. Co.*, 79 Iowa, 389; s. c. 44 Northwest. Rep., 686 (a witness familiar with the running of trains may testify as to the speed at which certain trains were running). *Blackmore v. Fairbanks*, 79 Iowa, 282; 44 North-

Notes on Size, Distance, etc.

west. Rep., 548 (a non-expert may testify as to the horse-power of an engine where his knowledge was derived by a comparison with a water wheel, the power of which was ascertained by actual measurement). *Munger v. City of Waterloo*, 83 Iowa, 559; s. c. 49 Northwest. Rep., 1028 (in an action for personal injuries where the size of the hole in which plaintiff claimed to have slipped is in evidence, the opinion of a witness as to whether or not a person could have put his foot in it is inadmissible). *Louisiana*: *State v. Casey*, 44 La. Ann., 969; s. c. 11 Southern Rep., 583 (a question as to time between two events, calls for a fact and not an opinion). *Michigan*: *Osten v. Jerome*, 93 Mich., 196; s. c., 53 Northwest. Rep., 7 (testimony that a drain was not large enough to carry the water conveyed to it by a certain cut, but that before the cut was made the drain was large enough to carry the water that came from other sources, is not a statement of an opinion but a description of the drain's capacity). *Thomas v. Chicago, etc., R. Co.*, 86 Mich., 496; s. c. 49 Northwest. Rep., 547 (one who has observed trains is competent to testify as to their speed). *Clink v. Gunn*, 90 Mich., 135; s. c. 51 Northwest. Rep., 193 (testimony as the quantity of logs converted is not a mere guess when based on a careful estimate made on the premises). *Oregon*: *Hudson v. Goodale*, 22 Oreg., 68; s. c. 29 Pacific Rep., 70 (a foreman, as a witness who had been engaged in running the logs in question down a stream, was asked by plaintiff to state from what he saw upon his trips, the number of logs taken by defendant with plaintiff's brand. *Held*, that the question was proper). *Pennsylvania*: *Vulcanite Paving Co. v. Ruch*, 1892, 23 Atlantic Rep., 555 (a witness may testify from measurements and calculations as to the quantity of paving done). *South Carolina*: *Harmon v. Columbia, etc., R. Co.*, 32 S. C., 127 (a non-expert may testify from his own experience and observation, as to the distance in which a train may be stopped. *Texas*: *International, etc. R. Co. v. Kuehn*, Tex. Civ. App., 1893, 21 Southwest. Rep., 581 (a witness may testify how long it would take a team to cross a track from the beginning of the approach to the crossing). *Wisconsin*: *Ward v. Chicago, etc., R. Co.*, 1893, 55 Northwest. Rep., 771 (a witness who lived near a railway and had seen trains pass may give his opinion as to how many miles an hour a train was running, although he does not know how many feet or rods there are in a mile).

M'Kee v. Nelson, 4 Cowen, 355.

M'KEE v. NELSON.

New York Supreme Court, 1825.

[Reported in 4 Cowen, 355.]

In an action for a breach of a promise to marry, a witness who has lived with plaintiff as a member of the family, may give testimony, based upon observation of plaintiff's deportment, as to whether she was sincerely attached to the defendant.

Action for breach of promise of marriage. On the trial, in the course of the examination of witnesses, W. J. M'Kee, Margaret M'Kee and Thomas M'Kee, witnesses for the plaintiff, expressed their opinions that the plaintiff was, from what they saw, much attached to the defendant. This passed without objection.

Afterwards, the plaintiff's witnesses, Thomas M'Kee, Margaret M'Kee and Robert M'Kee, were asked, by plaintiff's counsel, whether, living in the same house, and constantly associating with the plaintiff as a member of the family and from an attentive observance of her whole deportment during the courtship, and at the time of the defendant's deserting her, it was their opinion or not, that the plaintiff was sincerely attached to the defendant.

Defendant's objection to this question was overruled, the judge observing, that, whether the plaintiff's affection was sincere or not, could only be gathered from an attentive observation of her conduct, and was not susceptible of any other proof than what had been already given and was then offered by the plaintiff.

Verdict having been rendered for the plaintiff, and a bill of exceptions having been sealed, plaintiff's counsel moved to bring it to a hearing as frivolous.

The *Supreme Court* held there was no ground for the bill and denied a new trial.

Curia: We think the judge's decision founded in good sense, and in the nature of things. We do not see how the various facts upon which an opinion of the plaintiff's attachment must be grounded are capable of specification, so as to leave it, like ordinary facts, as a matter of inference, to the jury. It is true,

as a general rule, that witnesses are not allowed to give their opinions to a jury ; but there are exceptions, and we think this one of them. There are a thousand nameless things, indicating the existence and degree of the tender passion, which language cannot specify. The opinion of witnesses on this subject must be derived from a series of instances, passing under their observation, which yet they never could detail to a jury. Were there nothing more in the case ; therefore, we think there is no ground for the bill.

But we are not left to this ground. The objection came too late. It was certainly waived. The same opinion had been repeatedly expressed, in the same manner, in the course of the trial, by different witnesses, without any sort of objection. Just as the trial is drawing to a close, on these questions being put, the objection is made for the first time. The answer would have been a mere iteration of what had passed without objection, at intervals, during the whole previous course of the trial. At least, under the circumstances, it was altogether immaterial. It could not change the complexion of the case. [*Here followed a consideration of another point not relevant to our present inquiry.*]

New trial denied.

NOTE.—In *Tompkins v. Wadley*, 3 N. Y. Supm. Ct. (T. & C.), 424, an action for breach of promise of marriage, a witness, called for the defendant having testified to meeting and conversing with the plaintiff, was asked the question : “ Will you tell us what the manner of Mrs. Tompkins was in speaking ? ” “ what your opinion, from the manner of her speech, was, as to her respect for Wadley ? ”

This was *held* to have been properly excluded, as the witness was not shown to have had intimate enough acquaintance with plaintiff, to qualify her to give an opinion derived from her general deportment toward the defendant—she having visited the plaintiff only once after or about the time of the engagement, and met her once upon the street.

BLAKE v. PEOPLE.

New York Court of Appeals, 1878.

[Partly reported in 73 N. Y., 586.]

While the rule is that a witness must depose only to such facts as are within his own knowledge, yet he is not required to speak with such certainty as excludes all idea of doubt in his own mind—even in giving evidence in chief.

A witness may testify that he “does not think” one combatant in a struggle was choking the other.

Also, that “to the best of his knowledge” one of the combatants was down and the other was helping him up.

Also, in answer to a question whether the hold of the combatants was a friendly or unfriendly grasp, that “he did not know; he believed it was a friendly grasp.”

In a criminal prosecution, where the intention characterizes the act, such intention may be directly shown when a witness is available who is cognizant of it.

After the accused has testified in his own behalf, regarding his acts, it is permissible to cross-examine him on the motives which influenced him in such act.

Plaintiff was indicted for the murder of John McDonald by shooting.

Upon the trial, the testimony showed that at half-past eight the prisoner and the deceased, both under the influence of liquor, were standing together under a gas light, when McDonald, the deceased, slipped on one knee and got up again; they then had hold of each other, Blake having one hand on McDonald's arm and the other hand free, when the prisoner put his free hand behind him, drew a revolver and fired, and McDonald fell.

Asst. Dist. Atty. Rollins, for people.

Peter Mitchel, for plaintiff in error.

At the trial, the accused was found guilty.

The Supreme Court at General Term affirmed the judgment.

The Court of Appeals affirmed the judgment, after considering among others the following questions:

A witness for the people, was asked on cross-examination by

Blake v. People, 73 N. Y., 586.

the prisoner's counsel, if he would swear that the deceased was not choking him. The witness replied: "I would not swear it; *but don't think he was.*"

The last part of the answer the counsel moved to strike out. The court refused.

This was not error. Every witness must swear according to the impression on his mind, more or less strong. It has been held in this state that a witness may testify to an impression (Snell v. Moses, 1 J. R., 96-103; see, however, Cutler v. Carpenter, 1 Cow., 81). In the case in hand, the witness was conveying to the jury, his own conclusion, from the evidence of his senses directed to the acts of the prisoner and the deceased, on the evening of the shooting. When he said that he did not think that the deceased was choking the prisoner, he meant, and must have been so understood, that he recalled no circumstance of the encounter, which led his mind to such conclusion or belief. When he said that he would not swear that he was not choking him, he meant, and must have been so understood, that it was possibly so, though not observed by him. He was stating the fulness of his observation, and the strength of his recollection of what he observed (Lewis v. Freeman, 17 Maine, 260; Franklin v. City of Macon, 12 Geo., 257). True, it is a rule, that a witness must depose to such facts only as are within his own knowledge; but even in giving evidence in chief, he is not required to speak with such certainty as excludes all idea of doubt in his own mind. A witness may testify to his belief in the identity of a person, or of the handwriting of an individual, though he will not aver positively thereto (Rex v. Miller, 3 Wils., 427), and for false evidence so given he may be indicted for perjury (Rex v. Pedley, 1 Leach, 325; Reg. v. Schlesinger, 10 Q. B., 670; Folkes v. Chad, 3 Doug., 157-159).

A witness was asked "Which was down; are you able to tell?" He answered, "The one that was shot was down, and the other was helping him up, *to the best of my knowledge.*" The phrase, "to the best of my knowledge," it was moved to strike out. The refusal to do so was not error. It is referable to the same rules as the exception last considered.

A witness was asked on cross-examination in behalf of the

Blake v. People, 73 N. Y., 586.

prisoner whether the hold of the prisoner and the deceased upon each other was a friendly or an unfriendly grasp. He said he did not know; he believed it was a friendly grasp. The same principle above noticed comes in play here again. It is also within the rule of the *People v. Eastwood*, 4 Kernan, 562, where a witness was asked if, in his judgment, a person was intoxicated, and the question was held correct.

It was not error to permit the District Attorney to put questions to the prisoner, on cross-examination, calling for the motives which influenced him in certain of his actions. It was legitimate cross-examination. It did address itself to the operations of the mind rather than to bodily actions. But it was permissible to educe the purpose of the prisoner, in the bodily acts which he had just related, which purpose was material on the trial.

The objection, that operations of the mind are called for by such questions, is not tenable. Operations of the mind include the intention which precedes and urges an act. That intention is to be shown, to characterize the act. It may be such, as to make the act innocent, or guilty. It is to be inferred, or directly shown. When no witness is available who can directly prove it, it must be inferred or not known; when a witness is available, who is cognizant of it, it is proper for him to say what it was. (*Dillon v. Anderson*, 231, 236 and cases cited.)

The questions put by the court to the prisoner when on the stand as a witness, are of the same character. As questions, in the nature of a cross-examination, they are not erroneous. As to the propriety of the court addressing them to the prisoner, or other witness, we have nothing to say, for that depends very much upon the circumstances of each case, and the exigencies of each trial.

NOTE: Upon a trial for wife murder, a witness who had heard cries proceeding from the prisoner's house in the night preceding the wife's death, was asked what those cries indicated, whether the person was crying for joy, or what. This was objected to, but objection overruled, and the witness was permitted to answer that it seemed to him she cried for help; that he did not think she did it for pleasure.

Held, error; GROVER, J., saying, the question called for the conjecture of the witness as to the cause of the cries and not for a description of them; the former was incompetent, though the latter was not.

Notes of Cases on Another's Feelings, etc.

It was for the witness to describe the cries, so as to give the jury as correct an idea of them as possible, and then for the latter to draw such inferences therefrom as in their judgment were warranted. *Messner v. People*, 45 N. Y., 1.

In *Melick v. State*, 24 Southwest. Rep., 417 (Appeal to the Court of Criminal Appeals of Texas, Dec. 2d, 1893), on an indictment for murder at the trial court, one of the witnesses testified that he heard the voice of a woman at appellant's house on the evening before the dead body of deceased was found next morning. Counsel for the state asked witness, "Was the sound you heard a sound of distress?" Appellant objected because the question was leading and suggestive, whereupon the presiding judge prepared proper questions, in writing, came down from the bench to where the interpreter was sitting, handed him the paper upon which the questions were written, and told him to ask the questions as written. Appellant objected to the questions because they were, also, leading and suggested the answers. The questions were: "Did the noise sound as if the person was in joy, or distress? Was it as if she was laughing, or crying, or if she was suffering pain, or enjoying pleasure. Or was she making a mere idle noise, as if nothing was the matter with her?" Witness answered, "It sounded like a woman's voice, crying." *Held*, the questions were neither leading, nor suggestive of the answers.

NOTES OF RECENT CASES ON ANOTHER'S FEELING, MANNER, CONDUCT, INTENT, KNOWLEDGE.

Alabama: *Poe v. State*, 87 Ala., 65; s. c. 6 Southern Rep., 378 (upon a murder trial, it is not error to exclude testimony that defendant was afraid to go out after dark upon his own premises because of the threats of deceased). *Lewis v. State*, 1892, 11 *id.*, 259 (it is not error to exclude testimony that the accused seemed afraid, when offered to rebut the inference of guilt raised by his flight). *Montgomery v. Crosthwait*, 90 Ala., 553; s. c. 8 Southern Rep., 498 (testimony that a party examined a note thoroughly held admissible to show the party's knowledge of the manner the note was signed). *Reeves v. State*, 1892, 11 *id.*, 296 (upon the trial of an indictment charging a person with disturbing women at a public assembly, it is not error to permit a witness to testify that the accused was talking mad and that he and another looked like they were trying to fight). *Baldwin v. Walker*, 91 Ala., 428; s. c. 10 Southern Rep., 391 (in an action on attachment bond, it is error to permit a witness to testify that he knew the plaintiff was not about to leave the state). *Alabama, etc. R. Co. v. Tapia*, 1891, 10 *id.*, 236 (in a passenger's action for ejectment from a train, it is not error to exclude testimony that the conductor seemed to

be anxious to get the matter settled as to whether the plaintiff paid his fare, and in the witness's opinion the conductor acted as well as a man could do in such a case). *Bolling v. State*, 1893, 12 *id.*, 782 (it is error to permit an officer, who arrested one charged with larceny, to testify that the accused at the time of her arrest thrust her hand in a basket and under bundles "as though she was trying to conceal something"). *Arkansas*: *Williams v. State*, 47 Ark., 230; s. c. 16 Southwest. Rep., 816 (a witness may state a conclusion of fact drawn from the appearance and acts of another which are difficult to describe). *California*: *People v. Wright*, 93 Cal., 564; s. c. 29 Pacific Rep., 240 (upon a trial for mayhem, it is not error to exclude a question as to whether the interference of the prosecutor was such as would carry the information to the defendant that he was interfering only as a friend or would likely mislead the defendant as to his object). *Florida*: *Hodge v. State*, 26 Fla., 11; s. c. 7 Southern Rep., 593 (it is proper to exclude questions calling for a witness's conclusion or understanding of the conduct and intent of a person charged with a crime). *Georgia*: *Gardner v. State*, Ga., 1893, 17 Southeast. Rep., 86 (a witness cannot give his opinion, as to what deceased intended to do with a pistol for the possession of which he was struggling with a third person when defendant shot him). *Illinois*: *Walker v. People*, Ill., 1890, 24 Northeast. Rep., 424 (where the defense of one accused of murder is self-defense, it is proper to exclude testimony as to what the witness thought deceased was going to do when he reached for a revolver in his hip pocket). *Iowa*: *State v. Brown*, 1893, 53 Northwest. Rep., 92 (on a trial for seduction, prosecutrix's testimony that defendant kept company with her is not a statement of a mere conclusion, but that he treated her very affectionately is). *Massachusetts*: *Brown v. Massachusetts Title Ins. Co.*, 151 Mass., 127; s. c. 23 Northeast. Rep., 733 (in an action for libel against a corporation, corporate officers may testify that they did not, and to their knowledge no officer or employee of the corporation had any hatred, ill-will, or malicious intent, towards plaintiff in publishing the libel). *Minnesota*: *State v. Holden*, 42 Minn., 350; 44 Northwest. Rep., 123 (it is not prejudicial error to permit a witness to testify that the statements of another were made voluntarily where it appears that such testimony, when regarded with the other evidence, merely imported the fact that the statements were made without any inducements or threats from the person to whom they were made). *Missouri*: *State v. Buechler*, 103 Mo., 203; s. c. 15 Southwest. Rep., 331 (a witness may give his impression or opinion as to the appearance or expression of countenance of one accused of murder just after the affray). *North Carolina*: *State v. Edwards*, N. C., 1893, 17 Southeast. Rep., 521 (upon a trial for murder it is not error to permit a witness to testify whether defendant appeared mad or to be in fun when he approached deceased and declared his intention of killing him). *Pennsylvania*: *Barre v. Reading City, etc. Ry. Co.*, 155 Pa. St., 170; s. c. 26 Atlantic Rep., 99 (in an action for injuries while getting on a street car, a companion of the injured person cannot testify as to what she thought the driver was going to do). *South Carolina*: *State v. James*, 31

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S. C., 218; s. c. 9 Southeast. Rep., 844 (a witness, who has observed the intercourse between two persons may state generally that they were friendly; but if it appears on cross-examination that he merely speaks from what one of them has told him his testimony should be stricken out as hearsay). *Western Union Tel. Co. v. Adams*, 75 Tex., 531; s. c. 12 Southwest. Rep., 857 (it is not error to admit evidence that a person felt and exhibited mental anguish on account of a delay in the delivering of a telegram). *Biering v. Wegner*, 76 Tex., 506; s. c. 13 Southwest. Rep., 537 (it is error to permit a witness to testify that it was the understanding of the payee that the note was given under an agreement). *Cochran v. State*, 28 Tex. App., 422; s. c. 13 Southwest. Rep., 651 (upon a murder trial it is error to exclude testimony that the witness passed behind defendant because he expected that deceased would strike defendant with a billiard cue and that he himself might get hit, since the effect produced by deceased's conduct on a bystander's mind tends to explain the probable effect produced by deceased's acts upon the mind of defendant). *United States: Union Pac. Ry. Co. v. O'Brien*, 4 U. S. App., 112; s. c. 1 Cir. Ct. App., 354; 49 Federal Rep., 538 (where a locomotive engineer testified as to the defective condition of a portion of a railway, *held*, that it was not error not to allow him to state on cross-examination that the engineers on the road were all aware of such condition). *Vermont: State v. Bradley*, 64 Vt., 466; s. c. 24 Atlantic Rep., 1053, (a question as to accused's appearance when charged with a crime and the answer that he appeared worried, *held* admissible).

Rawls v. Amer. Mutual Life Ins. Co., 27 N. Y., 282.

RAWLS v. AMERICAN MUTUAL LIFE INS. CO.

New York Court of Appeals, 1863.

[Reported in 27 N. Y., 282.]

Witnesses, shown to have known a person intimately for a number of years, are competent to testify to the fact of his general good health and soundness of constitution during the period.

Rawls sued on a policy issued by defendant in July, 1853, on the life of John L. Fish, payable to plaintiff. The defence set up, among other things, that false representations as to Fish's health were made.

On the trial a witness, who knew him intimately from 1848 to 1853, was asked by the plaintiff: "When you first knew Fish what was his health and constitution?" Another witness, his partner during that period, was asked: "What was it down to 1853?"

Objection was overruled, and defendant excepted.

At *Circuit* judgment was entered on a verdict for the plaintiff.

The Supreme Court at General Term affirmed the judgment.

The Court of Appeals affirmed the judgment.

WRIGHT, J. [*as to this particular question*]: The witnesses to whom the inquiry was made, had known Fish intimately from 1848 down to the period when the policy was obtained, and were competent to testify to the fact of his general good health and soundness of constitution.

In *Sloan v. N. Y. Central R. R. Co.* 45 N. Y., 125, an action for damages for injuries received in a railroad accident; it was *held*, proper in determining plaintiff's condition, to ask her female attendant how far she helped herself, and at what point she required assistance to do what was necessary to be done, as such a question called for facts and not mere opinion.

In *Higbie v. Ins. Co.* 53 N. Y., 603, an action on a life insurance policy, it was *held*, that all persons of ordinary understanding are competent to give an opinion whether one whom they have had an opportunity to observe appears to be sick or well.

In *Ashland v. Marlborough*, 99 Mass., 47, where the issue was whether one Maynard had or had not become disabled from disease contracted while engaged in military service, it was *held*, error to allow a non-expert witness on the trial to testify that, before enlisting, Maynard "did not appear like a well man."

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Notes of Cases on Physical Condition.

NOTES OF RECENT CASES ON ANOTHER'S PHYSICAL CONDITION.

Alabama: Dean v. State, 89 Ala., 46; s. c. 8 Southern Rep., 38 (it is not error not to permit a non-expert to testify whether another's injuries are permanent). *Georgia*: Chattanooga, etc. R. Co. v. Huggins, 89 Ga., 494; s. c. 15 Southeast. Rep., 848 (after stating facts tending to show that plaintiff had been disabled by an injury, a witness may give his opinion that plaintiff has been unable to perform any duties requiring the slightest physical exertion and during severe attacks was unable to do anything, and at his best could do nothing but slight jobs). *Illinois*: Chicago City Ry. Co. v. Van Vleck, 1893, 32 Northeast. Rep., 262 (it is not error to permit the familiar associates of a person to testify as to whether he was in good or bad health, or has good or bad sight or hearing, etc.). *Iowa*: Winter v. Central Iowa R. Co., 80 Iowa, 443; s. c. 45 Northwest. Rep., 737 (it is not error to allow a non-expert to testify in an action for negligence as to plaintiff's appearance and condition and as to whether he had recovered from former injuries); Van Gent v. Chicago, etc. R. Co., 80 Iowa, 526; s. c. 45 Northwest. Rep., 913 (it is not error to permit a non-expert to testify as to the effect of an injury upon another's health so far as it relates to visible effects manifested by physical exertions); Stone v. Moore, 83 Iowa, 186; s. c. 49 Northwest. Rep., 76 (it is not error to allow in an action for an assault an acquaintance of the plaintiff to testify that plaintiff's physical condition was one of feebleness and inability to do hard work). *New York*: James v. Ford, 30 State Rep., 667; s. c. 9 N. Y. Supp., 504 (any intelligent person may testify as to an injured person's appearance before the accident). *Ohio*: Shelby v. Claggett, 46 Ohio St., 549; s. c. 22 Northeast. Rep., 407 (a non-expert may testify from personal observations as to another's condition of health, pain, etc.). *South Carolina*: Price v. Richmond, etc. R. Co., 38 S. C.; s. c. 17 Southeast. Rep., 732 (in an action for causing death it is not error to allow decedent's brother as a witness to give his opinion as to decedent's condition of health before his death, where the witness states the facts upon which his opinion is based). *Texas*: Houston City St. Ry. Co. v. Sciacca, 80 Tex., 350; s. c. 16 Southwest. Rep., 31 (it is not error to exclude the testimony of a non-expert as to whether a crushed head had been caused by a car passing over it). *West Virginia*: Lawson v. Conway, 37 W. Va., 159; s. c. 16 Southwest. Rep., 564 (in an action for malpractice, one well acquainted with plaintiff's physical condition to perform labor both before and after the injury may testify that before the injury plaintiff was a strong and able-bodied man, but that since then he was unable to perform half a man's work). *Wisconsin*: Heddles v. Chicago, etc. R. Co., 1890, 46 Northwest. Rep., 115 (in an action for personal injuries it is not error to permit a witness who nursed plaintiff after the accident to state whether plaintiff suffered greatly or not).

Notes of Cases on Physical Condition.

NOTES OF RECENT CASES ON ONE'S OWN PHYSICAL CONDITION.

Alabama, etc. *R. Co. v. Frazier*, 93 Ala., 45; s. c. 9 Southern Rep., 303 (it is not error to permit plaintiff in an action for personal injuries to testify as to the permanent character of the injury inflicted, where there has been a lapse of time since the injury was inflicted during which the abnormal condition continued).

Brantly v. State, 91 Ala., 47; s. c. 8 Southern Rep., 816 (a witness may testify as to the effect of a liquor upon himself in order to show that it was intoxicating).

Spaulding v. Bliss, 83 Mich., 311; s. c. 47 Northwest. Rep., 210 (in an action for malpractice in reducing a fracture of plaintiff's thighbone, plaintiff may testify as to the symptoms and her feelings as to the location of the pain, but not whether they were caused by a rupture of a ligament).

Pullman Palace Car Co. v. Smith, 79 Tex., 468; s. c. 14 Southwest. Rep., 993 (a person claiming to have been injured by exposure caused by the act of defendant's servant may testify that she knew of nothing else except the exposure which could have caused her illness).

Casey v. N. Y. Central, etc., R. Co., 6 Abb. N. C., 104.

CASEY v. N. Y. CENTRAL, ETC., R. CO.

N. Y. Court of Common Pleas, 1879.

[Reported in 6 Abb. N. C., 104.]

In an action for negligently causing the death of plaintiff's intestate, a witness was asked if he was in a position where, if the bell of a locomotive engine had been rung, he could have heard it, and he answered that he was. *Held*, that this was testifying to a fact and not to an opinion.

Plaintiff sued to recover damages for the death of his child, alleged to have been caused by the negligent running of defendant's train.

The facts material to the ruling appear in the opinion.

At Trial Term, judgment was entered for the plaintiff.

The General Term of the Court of Common Pleas affirmed the judgment. DALY, Ch. J. [*after passing upon a refusal to non-suit, and another question of evidence*]: The same witness was asked if he was in a position where, if a bell had been rung, he could have heard it, and he answered that he was. This also was testifying to a fact and not to an opinion. He was sitting in the window of a house at the southeast corner of Tenth avenue and Thirty-first street with his head out of the window. He saw the train in motion before the girl was killed, and saw it pass Tenth avenue. He testified that his hearing was good, and a subsequent witness testified that the ringing of a bell of a locomotive could be heard for three or four blocks. It is insisted that it was for the jury, and not for the witness, to judge whether he could, from the position he occupied, hear the bell. It was for the jury to determine whether the bell was rung or not; but as to the witness' faculty of hearing, he knew better than the jury could possibly know, how far he could hear the ringing of the bell of a locomotive. He knew that at a certain distance from a locomotive, which he saw passing, that he could hear the ringing of its bell, and could swear to that as a fact. It was not testifying that he must have heard it, if it were rung, but simply as to his ability to hear the ringing of such a bell at

 Note of Cases on Hearing and Seeing.

a given distance, which was testimony to go to the jury for what it was worth. It is often difficult to determine the line of demarcation which separates the expression of an opinion from the statement of a fact, and this, in my judgment, was the statement of a fact.

VAN BRUNT and LARREMORE, JJ., concurred.

Judgment affirmed.

NOTE: In *People v. Chacon*, 3 N. Y. Crim. Rep., 418, 428, the trial of an indictment charging murder, a witness was asked by a juror "If Maria Williams (the deceased) had been in her room at the time of the shooting, would not you have seen her there?" The answer was, "Certainly."

Held, that the court properly refused to strike out the answer, for the question called for no matter of judgment or opinion, but strict matter of fact.

In an action for negligence of defendant, whereby plaintiff's intestate was run over by a locomotive, one of the plaintiff's witnesses, on cross-examination, having stated that the locomotive was some forty or fifty feet east of the switch shanty blowing off steam, was asked whether the deceased could have heard it. This was objected to.

Held, that the objection was properly sustained, *BAKER, J.*, saying: "It does not appear that the witness was either in or near the shanty, and the jury was just as capable of drawing a conclusion, whether or not the deceased heard the steam escaping, as the witness. *Chicago, M. & St. P. Ry. Co. v. O'Sullivan*, 32 N. E. Rep., 398 (Illinois, 1892).

NOTES OF CASES AS TO TESTIMONY REGARDING HEARING AND SEEING.

Alabama. *Ensley, etc., R. Co. v. Chewning*, 93 Ala., 24; s. c. 9 Southern Rep., 458 (a witness who has testified that he did not hear a locomotive whistle or bell, may state that there was nothing to prevent his hearing them, though he cannot testify that he would have heard them if they had been sounded). *East Tenn., etc., R. Co. v. Watson*, 90 Ala., 41; s. c. 7 Southern Rep., 813 (upon cross-examination it is not error to exclude a question as to whether there might have been a whistle sounded which the witness did not hear). *Helton v. Alabama Midland Ry. Co.*, 1893, 12 Southern Rep., 276 (where the testimony of two witnesses differed as to what railway lights were displayed, it is error to permit one to testify that he was in a better condition to see the lights than the other). *East Tenn., etc., R. Co. v. Watson*, cited before (a witness may give his opinion as to how far a house could ordinarily be seen along a railway, where all the details cannot be laid before the jury). *Illinois*: *Chicago*,

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etc., R. Co. v. Dillon, 123 Ill., 570; s. c. 15 Northeast. Rep., 181 (it is not error to permit a witness to testify that he could have heard a locomotive's whistle or bell, if they had been sounded or rung). Chicago, etc., Ry. Co. v. O'Sullivan, 1893, 32 *id.*, 398 (a witness cannot testify as to whether a deceased person could have heard the locomotive by which he was killed blowing off steam just before the accident, if it does not appear that the witness was near the place at the time). Maynard v. People, 135 Ill., 416; s. c. 25 Northeast. Rep., 740 (where a witness has testified that certain statements were not made, it is error to refuse to permit him to answer an inquiry whether if there had been any such conversation he would have heard it). Ogden v. People, 134 Ill., 599; s. c. 25 Northeast. Rep., 735 (a statement by a witness as to what he ascertained by hearing is a fact, and not an opinion). Carter v. Carter, 1892, 28 *id.*, 948 (a witness, after stating the conversation and sounds which he had heard in an adjoining room, may give his opinion that from what he heard, an act of adultery was being committed). Iowa : Snyder v. Witwer, 82 Iowa, 652; s. c. 48 Northwest. Rep., 1046 (one who has examined an elevator opening under similar conditions, may testify whether the light in the opening was sufficient to enable it to be readily seen). Kentucky : Eskridge v. Cincinnati, etc., R. Co., 89 Ky., 367; s. c. 12 Southwest. Rep., 580 (after a witness has testified that he did not hear a whistle, it is not error to exclude a question as to whether he could have heard one if it had been given). United States, Gulf, etc., R. Co. v. Washington, 4 U. S. App., 121; s. c. 1 Cir. Ct. App., 286; 49 Fed. Rep., 347 (a witness familiar with a railway track where cattle were killed, is competent to testify as to the distance at which cattle on the track could be seen by an engineer). Wisconsin : Grundy v. Janesville, 84 Wis., 574; s. c. 54 Northwest. Rep., 1085 (a witness living in a house opposite to a depression in a street, may testify that during a night she heard a wagon going into it).

Holcomb v. Holcomb, 95 N. Y., 316.

HOLCOMB v. HOLCOMB.

New York Court of Appeals, 1884.

[Reported in 95 N. Y., 316.]

The rule in *Clapp v. Fullerton* (34 N. Y., 190)—that a lay witness who is examined as to facts within his own knowledge and observation, tending to show the soundness or unsoundness of a person's mind, may characterize as rational or irrational the acts and declarations to which he testifies; but, except in the case of a subscribing witness to a will, his opinion must be limited to his conclusions from the specific facts he discloses; that is, he may give the impression produced by what he witnessed but cannot give an opinion on the general question whether the person's mind was sound or unsound,—*applied*, the court holding that the witness should state the facts which he observed whether they were acts or declarations, and his examination should be limited to the conclusions drawn from them.

The reception of testimony of lay witnesses that from what they had observed in the acts and conversations of an assignor (without limiting it to acts, etc., specified), they thought that his mind was gone, and characterizing his condition as imbecile.—*Held*, error.

On the trial, witnesses for the plaintiff were permitted to testify as to their opinion of assignor's mental condition, without specifying the facts on which they based their opinions. [*The general forms of the questions and answers appear in the opinion.*]

The Supreme Court at Special Term gave judgment for plaintiff.

The General Term affirmed the judgment, saying as to the impressions and opinions: Such impressions or opinions are the results of observation and experience in the ordinary affairs of life. It is difficult and frequently impossible to give all the circumstances going to create the impression or belief. So we say a person was intoxicated or a couple were attached to each other, and such evidence is competent to establish the fact though but few of the reasons can be detailed which enter into the formation of our judgment. Such was the character of the evidence excepted to in the present case. The witnesses stated circumstances which they had observed, declarations which they had heard, conduct attracting their attention, and from these

facts, and others too impalpable to be remembered or detailed, they believe the deceased had lost his mind and memory, that he was an imbecile and was incapable of taking care of himself. The evidence was competent and properly received (*Clapp v. Fullerton* 34 N. Y., 190; *O'Brien v. People*, 36 N. Y., 282; *Hewlett v. Wood*, 55 N. Y., 634). It is peculiarly proper in a case where mental imbecility is in issue (*De Witt v. Barly*, 17 N. Y., 340).

The Court of Appeals reversed the judgment.

DANFORTH, J. The plaintiff averred, and the defendant by answer admitted, that the bond and mortgage in question were assigned, transferred and delivered by Homer Holcomb, the plaintiff's intestate, to the defendant. The plaintiff's right to the relief sought in this suit depended upon his showing, either that at the time the transfer was made the assignor was imbecile or unsound of mind and mentally incompetent and incapacitated to make the same or, that the transfer was procured by the defendant by threats, oppression or other undue influence. These things are alleged in the complaint as the grounds of action. The jury have found both allegations to be true, and the only question for our consideration is whether improper testimony was received and submitted to them as evidence upon which such a result might be reached.

The assignment was dated April 1, 1875, and acknowledged February 3, 1876. The intestate died on that day. *First*, many witnesses called by the plaintiff, delivered their opinions as to the mental condition of the assignor; and, *second*, many members of his family, entitled to share in the avails of this judgment, if it be sustained, testified to his transactions and conversations. The contention of the appellant hangs upon these two circumstances.

The general rule is not disputed that in ordinary cases a witness ought to be examined as to facts only, and not as to any opinion or conclusion which he may have drawn from them. An admitted exception to this rule is found in cases where the conclusion to be drawn is an inference of skill and judgment. It is not claimed that the witnesses to whom I have referred were

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especially versed in the matter to which their attention was directed, nor were they presented to the jury in the character of experts; but the respondent insists that as mere observers of the subject of inquiry they were equally competent to express an opinion, provided it was formed upon what they saw and heard, and cites to this point, *De Witt v. Barly* (17 N. Y., 340). When that case was first before this court (9 *id.*, 371), it was held by a divided court after a very full discussion by several of its members, that unless specially qualified by scientific knowledge to judge of such matters, the opinions of witnesses were not competent evidence of the soundness or unsoundness of mind of a grantor at the time of execution of a deed. This rule necessarily excluded the opinions of laymen upon questions of mental capacity. Upon the second appeal the rule was somewhat modified, and the court held such evidence admissible, but that the witness must state, so far as he is able, the facts and reasons upon which he bases his conclusions, in order that the jury may test the accuracy of his opinion, and if from such statement they are able to see that his conclusion is unfounded, they are of course to disregard it.

In *Clapp v. Fullerton* (34 N. Y., 190), with both these decisions before it, the court reiterated with some amplification the rule laid down upon the last occasion, saying, when a layman is examined as to facts within his own knowledge and observation tending to show the soundness or unsoundness of a testator's mind, he may characterize as rational or irrational the acts and declarations to which he testifies. "But," they add, "to render his opinion admissible, even to this extent, it must be limited to his conclusions from the specific facts which he discloses. He may testify to the impression produced by what he witnessed, but he is not legally competent to express an opinion on the general question whether the mind of the testator was sound or unsound."

The limitation applied to such witnesses is made more apparent by the exception in favor of subscribing witnesses, who may be required to state not only such facts as they remember but their own conviction of the testator's capacity. (*Clapp v. Fullerton, supra.*)

The rule which I have quoted from the case cited was adhered to in *O'Brien v. People* (36 N. Y., 276), where, after describing the appearance and manner of the person concerned, the witness was asked "Was he, or not, in your opinion, insane or delirious." This court held the question to have been properly excluded, because it contravened the rule referred to. In *Real v. People* (42 N. Y., 270), witnesses testified to facts tending to show the mental unsoundness of the accused, but the court held that they could not be permitted to testify as to what they thought of his state of mind, or of their impression as to his state of mind. In *Hewlett v. Wood* (55 N. Y., 634), the rule laid down in *Clapp v. Fullerton*, and quoted in the *O'Brien & Real* cases, was again relied upon and applied. In *Rider v. Miller* (86 N. Y., 507), testimony was held admissible of impressions of the witness that specific acts and conversations of the grantor at different times were irrational, and in the more recent case of *In re Ross* (87 N. Y., 514), the rule of evidence given in the preceding cases is re-stated. It flows legitimately from the reasoning of the court in *De Witt v. Barly* (*supra*), and in all cases requires the witness to state the facts which he observed, whether they are acts or declarations, and limits his examination to the conclusions drawn from them.

This rule was violated in the case at bar. The subject in dispute was the mental condition of the assignor. The jury were to say whether he was capable of contracting. The plaintiff asked Abel Holcomb, a son of the assignor, "How would you characterize his acts and conversations from what you observed within the last two years of his life, and received for answer "From his acts I considered his mind was gone." The question was objected to, and defendant's counsel also moved to strike out the answer because, among other reasons, it was incompetent. The motion was denied and the defendant excepted. The acts referred to had not been specified, and, although the testimony of the witness embraced various matters, the question was not limited to those, and no clue was afforded the jury by which they could test the accuracy or value of the opinion of the witness.

In 1871 he was with the witness "three or four days or a

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week." Question: "What did you notice about him then?" Objected to as incompetent. Answer: "I noticed, to be plain about it, that his mind was about as good as gone."

Woolhiser met him in the street and gives particulars of the interview. Being asked "What was your impression as to his mental condition, from what you saw and what he said," the question was objected to and was then put in this form: "What was your impression as to his mental condition. How would you characterize it?" The court: "You may give his appearance as well as you can." The witness replied "My idea was that he had failed very much in his mind," and being again asked "How did his actions and conversations appear to you?" answered "He appeared to be what we might call at the time imbecile, not in good healthy mind, what you would say, an imbecile." Frank H. Burroughs, plaintiff's son-in-law, being called by the plaintiff, said he first saw the intestate in the summer of 1874, at the defendant's house; was there present at an interview between his (witness') wife and the intestate. She said "How do you do, grandfather." He did not know her until she told him who she was, and then he knew her. He did not have anything particular to say, or manifest any pleasure at seeing her. He did not inquire about her father. The defendant came in and brought some wine, and gave some to all except the intestate. The witness says "I think he, at the time, looked as if he wanted some wine. Looked as a child would. None was offered to him and he did not have any." Witness proceeds: "I saw him in July, 1875. I was riding in a wagon with Thomas B. Holcomb. Met intestate in the road, walking by the side of the road with a cane. When we got to him we stopped, and Thomas got out and went to him and said, 'how do you do father,' shook hands with him and asked him if he didn't know him. His reply was, he didn't know him. My father-in-law said 'I am Thomas.' The intestate made no manifestation of gratification or pleasure, or any inquiries of our family."

Asked by plaintiff's counsel:

"Q. How would you characterize his condition from what you saw of his acts, what you heard?"

This was objected to by defendant's counsel as "incompetent and immaterial,—witness was not an expert."

The objection was overruled and defendant excepted.

Witness answered: "His appearance and manner and what he said, taking it altogether, I considered him imbecile and his mind gone, indicating imbecility of mind."

Counsel for the defendant here moved to strike out the evidence that witness regarded the intestate as an imbecile, on the ground that it is an opinion of the witness, and that it is for the jury to draw their conclusion from the evidence or facts detailed by the witness.

Abel G. Holcomb, son of the deceased, testifying to an interview with him during the last two or three years of his life, said: "From his acts I considered his mind was gone."

Defendant moved to strike that out. Motion denied and exception taken.

These are but instances illustrating the practice which appears to have been followed upon the trial. It cannot be doubted that the evidence was of a character to greatly prejudice the defendant. If the jury believed the witnesses and trusted to their opinions it is difficult to see how they could have rendered any verdict other than the one which they did render. The assignor was presented to them, by evidence pronounced competent, as one who had wholly lost his memory and understanding—as an imbecile—and the answer of the jury to the question, whether his mind has become so impaired that he was mentally incompetent to comprehend and make the transfer of the bond and mortgage, was but an echo of the opinions which had been expressed in evidence. Such a person would necessarily be liable to be controlled, and a conclusion would easily follow that the act of assignment, upon the validity of which the jury were to pass, was caused by undue influence. [*Here followed a consideration of the admission of evidence improper under the Code Civ. Pro., § 829.*]

Judgment reversed.

Paine v. Aldrich, 133 N. Y., 544.

PAINE v. ALDRICH.

New York Court of Appeals, 1892.

[Reported in 133 N. Y., 544.]

On the question of soundness of mind of a grantor, a non-professional witness cannot testify as to the opinion he formed of the grantor's mind, from his conversations, or what impressions he gave the witness as to whether he was rational or irrational; although he might testify whether in his judgment the grantor's conversations and acts which the witness has stated were those of a rational or irrational man.

Action to set aside conveyances by plaintiff's grandfather, John Paine, since deceased, on the ground that the grantor was *non compos mentis* at the time of its execution. On the trial several exceptions were taken by plaintiff to the exclusion of evidence, much of it relating to the conclusions or opinions of non-expert witnesses as to rationality of the ancestor.

The Supreme Court at Special Term gave judgment for the defendants.

The General Term affirmed the judgment on the same grounds as stated in the following opinion on appeal.

The Court of Appeals affirmed the judgment.

MAYNARD, J. [*after stating the facts*]: We have carefully examined the exceptions taken to the exclusion and admission of evidence offered upon the trial, and are of the opinion that no such errors were committed as to require a new trial of the action. Much of the matter excluded related to the conclusions or opinions of non-expert witnesses, and was clearly inadmissible. The question put to the witness, Cornish, was not brought within the rule laid down by this court in *Holcomb v. Holcomb* (95 N. Y., 316), and kindred cases. The witness had testified to some extended conversations with Mr. Paine, comprising negotiations for a business transaction of an important character, and had stated, with some detail, what he had observed, what had been said and what Mr. Paine did, and he was then asked, "From

People v. Aldrich, 133 N. Y., 544.

his acts that you saw there in your conversation with him, what opinion, if any, did you form as to his mind?" Objection was made and sustained, when this question was asked: "Taking into consideration these facts that you have stated here in your testimony to-day, which you learned from your contract with Mr. Paine and from his conversations with you, what impression did he give you as to whether or not he was rational or irrational?" An objection to this question was also sustained. The court then put the following question: "From the conversations you had with him, and from his actions, his acts in your presence, were those conversations or those acts those of a rational or an irrational man?" which the witness answered in his own way.

The trial court applied the correct rule in regard to this class of evidence. The witness was a layman and could not properly give an opinion as to the mental capacity of the grantor, or as to whether he was rational or irrational, even when such opinion might be based upon specific acts and conversations, and his personal observations. He could state the acts and conversations of which he had personal knowledge, and then be permitted to say whether, in his judgment, such acts and conversations were rational or irrational, or were those of a rational or irrational person.* This is the extent to which any of the cases have gone, and the tendency is to limit rather than enlarge the rule, because,

*In *People v. Packenham* (115 N. Y., 200), a homicide case, where the condition of the accused at about the time of the homicide was under investigation; a witness having testified that he appeared to be sober but "looked as though he had been getting over the effects of a drunk," yet answered questions responsively, was asked "Now, from what you saw and what you heard him say at that time, in your opinion, was he rational or irrational?"

This was objected to as incompetent and admitted under exception, the witness answering "Rational."

Held, that the evidence was competent. FINCH, J., in discussing the point saying: "The question and answer clearly related to the appearance and conduct of the prisoner on the one occasion which formed the subject of the inquiry, and what was sought was a description of that appearance and conduct as rational or the reverse. * * * The effort now is to transform the inquiry into one as to the prisoner's actual mental condition, which could only be given by an expert. Such was not the question, and its meaning is so entirely obvious that it could not have been misunderstood by the court and jury."

Notes of Cases on Mental Condition.

even in its present form, it is an infringement of the fundamental law of evidence that a witness, who is not an expert, shall not be permitted to testify to his conclusions or opinions as to an issuable fact. [*Here followed a consideration of another question.*]

Judgment affirmed.

NOTES OF RECENT CASES ON NON-EXPERT EVIDENCE REGARDING MENTAL CONDITION.

California: *Carpenter v. Bailey*, 94 Cal., 406; s. c. 29 Pacific Rep., 1101 (under Cal. Code Civ. Pro., § 1870, only an intimate acquaintance of a person is competent to give an opinion of his sanity, the reason for the opinion being given). *Florida*: *Armstrong v. State*, 30 Fla., 170; s. c. 11 Southern Rep., 618 (non-experts cannot give a general opinion as to sanity, but may state facts tending to show the mental condition of another, and express an opinion thereon). *Indiana*: *Pennsylvania Co. v. Newmeyer*, 129 Ind., 401; s. c. 28 Northeast. Rep., 860 (a non-expert should first be asked to state the facts on which his opinion as to the mental condition of another is based, and then the question should be so framed as to call for an opinion based on such facts); s. p. *Burkhart v. Gladish*, 123 Ind., 337; s. c. 24 Northeast. Rep., 118; *Fiscus v. Turner*, 125 Ind., 46; s. c. 24 Northeast. Rep., 662; *Mull v. Carr*, Ind. App., 1893, 32 *id.*, 591 (one, who has nursed a person for a few days and has testified as to his appearance, actions and conversations, is competent to give an opinion as to such person's sanity). *Kentucky*: *Hite v. Commonwealth*, 1892, Ky., 20 Southwest. Rep., 217 (it is for the trial court to determine whether a non-expert's opinion as to sanity is based on sufficient observation). *Massachusetts*: *Williams v. Spencer*, 150 Mass., 346; s. c. 23 Northeast. Rep., 105 (ordinary witnesses, whatever their opportunities of observation may have been, cannot give a mere opinion as to the mental condition of another; and although subscribing witnesses to a will may testify as to the opinions they had of the testator's capacity at the time of the execution of the will, yet the rule excludes even the opinions of such witnesses where they were formed either before or after the will was executed). *Montana*: *Territory v. Roberts*, 9 Mont., 12; 22 Pacific Rep., 132 (a non-expert may testify as to his opinion of the sanity of a person with whom he is well acquainted). *Missouri*: *Sharp v. Kansas City Cable Ry. Co.*, 1892, 20 Southwest. Rep., 93 (a non-professional witness may give his opinion as to another's mental condition, provided he states the facts upon which his opinion is based). *Nevada*: *State v. Lewis*, 20 Nev., 333; s. c. 22 Pacific Rep., 241 (a non-expert may give his opinion as to another's sanity without giving all the details upon which he bases it). *New York*: *White v. Davis*, 17 N. Y. Supp., 548; s. c. 42 State Rep., 901 (non-experts cannot give a general opinion as to another's

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sanity, but can only give their opinion as to whether the particular words and acts to which they testify are rational or irrational). *Matter of Klock*, 49 Hun, 450; s. c. 19 State Rep., 307 (upon a proceeding for the appointment of a lunacy commission a non-expert cannot testify that the impression made upon his mind was that the person was failing fast, physically and mentally). *Pennsylvania: Commonwealth v. Buccieri*, 153 Pa. St., 535; s. c. 26 Atlantic Rep., 228 (a non-expert will not be permitted to express an opinion as to the sanity of one accused of a crime where the acts and conversations upon which the opinion is based, as well as the phase of insanity to be proven have no bearing on the mental condition of the prisoner at the time when the crime was committed). *Texas: Brown v. Mitchell*, 75 Tex., 9; s. c. 12 Southwest. Rep., 606 (a witness present at the execution of a will, may, after testifying as to testatrix's appearance and conversations, give his opinion as to her mental capacity). *Vermont: Chickering v. Brooks*, 61 Vt., 554; s. c. 18 Atlantic Rep., 144 (a non-expert may testify as to his opinion of the mental capacity when he states his opportunity for observation and details the conversations from which he draws his opinion). *In re Blood's estate*, 62 Vt., 359; s. c. 19 Atlantic Rep., 770 (upon the contest of a will, a non-expert's opinion as to testator's capacity to make a will is admissible; as it permits the witness to pass upon the question in issue). *West Virginia: State v. Maier*, 36 W. Va., 757; s. c. 15 Southeast. Rep., 99 (on a trial for murder it is not error to permit a witness, examined by the state in rebuttal—who knew the defendant well, and had had transactions with him—to be asked whether or not he had ever observed anything about the accused in what he said or did that indicated insanity).

People v. Eastwood, 14 N. Y., 562.

PEOPLE v. EASTWOOD.

New York Court of Appeals, 1856.

[Reported in 14 N. Y., 562.]

On the question whether a person was intoxicated, it is competent to ask a witness who saw and observed him on the occasion referred to, whether or not he was then under the influence of intoxicating liquor, or what was his condition as to sobriety; for this does not call for an answer violating the general rule as to excluding the opinions of witnesses.

Writ of error to review the reversal by the General Term of a conviction on an indictment for murder.

It appeared that the prisoner and one La Rock, having quarreled with Edward Brereton, the deceased (who, with his brother, John Brereton, was driving cattle along the road), followed them up, interfering with them and keeping up the quarrel, the prisoner using language which indicated a design to kill the Breretons.

It was a question on the trial whether the threatening words were intended in ordinary import, or were the comparatively idle and unmeaning expressions of drunken men.

Green, a witness of the affray, examined for the defence, said: "Eastwood's appearance was as if something was the matter with him; I am accustomed to see men under the influence of liquor and intoxicated.

Q. (By defendant's counsel): From his conduct and deportment, and other facts connected with it, state whether he was, in your judgment, to any considerable extent, under the influence of intoxicating liquors?

Objected to by the prosecution, on the ground that it was not competent for the witness to state his opinion: he must be confined to the statement of facts.

Objection sustained; exception taken.

The witness then testified that immediately after the blow "I discovered incoherence in Eastwood's speech. He acted wild and quite different from what he formerly did. He did not

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make many remarks. He looked wild out of his eyes and very blue. His breath smelt of liquor."

Defendant was convicted.

The Supreme Court at General Term reversed the judgment, on the ground, among others, that it was error to exclude the above question. They said that when intoxication is material, the opinion of one who was present and had full opportunity to judge can be received. SELDEN,* J., delivering the opinion of the court, said, in effect, that there is one of two classes of exceptions to the rule that opinions are not evidence: (1) questions of science, art or trade, on which skilled witnesses or experts may give opinions; and (2) opinions *necessary* to enable the jury to form a clear and accurate judgment, because of the impossibility of accurately describing in language the minute facts and appearances, upon which a judgment as to the main fact must necessarily depend; and he gave as illustrations, *McKee v. Nelson*, 4 Cow., 355 (sincere attachment of persons engaged to be married); *Morse v. State of Conn.*, 6 Conn., 9 (age of absent person at a specified time); *Clay v. Clary*, 2 Ired. L., 78 (the temper in which words were spoken or acts done; kindly or rudely, in good humor or in anger, in jest or in earnest).

E. A. Raymond, district attorney, for plaintiff in error.

T. Hastings, for defendant.

The Court of Appeals affirmed the judgment of the Supreme Court.

MITCHELL, J. [*after stating the facts and considering intoxication as affecting "design in murder"*]: The question, whether the prisoner was intoxicated was also material, that the jury might judge (as before stated) whether the threats used were the deliberate words of sober and bad men, or the idle and coarse language of drunken men; accordingly, the facts to show intoxication were received, not in this instance alone, but other witnesses also testified to them. Seth Keyes said: "They appeared to be intoxicated." Osborn Hanford said: "I should think Eastwood had been drinking at the time, but I did

* Samuel L. Selden.

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not see him stagger." The prosecutor, on the other hand, had, before this, proved that before either affray Eastwood and La Rock had rudely interfered with other travelers, thus tending to exhibit them as ready for a row or a fight, and the first to provoke it. He showed that Eastwood took hold of the horse's bits of a traveler, and shoved the horse of an old man off the track, claiming the track for himself; that he next had talk with men passing in a wagon; and after that had the first affray with the Breretons. The jury might believe this, if done by sober men, showed a deliberate design to do every kind of bodily harm, but if done by intoxicated men, might consider it merely a temporary excitement, without such design.

The objection was, accordingly, to the form of the question, as if it sought the witness' opinion. If the opinion of the witness had been asked as to facts not within his own observation, the objection would have been good; as to such facts, opinions can be given generally only as to matters of science or art, and by men of the particular science or art. The Court of Oyer and Terminer were probably misled by the form in which the question was put. The inquiry was not intended to bring out an opinion, but to lead the witness to answer to a fact which he saw. If the question had been (as it might have been) direct, "What was the condition of the prisoner as to sobriety at that time?" it probably would have been answered (as it had been before, by other witnesses) without objection. It did not become incompetent by adding the words, "in your judgment," while the judgment was restricted to what the witness saw. A child six years old may answer whether a man (whom it has seen) was drunk or sober; it does not require science or opinion to answer the question, but observation merely; but the child could not, probably, describe the conduct of the man, so that, from its description, others could decide the question. Whether a person is drunk or sober, or how far he was affected by intoxication, is better determined by the direct answer of those who have seen him than by their description of his conduct. Many persons cannot describe particulars; if their testimony were excluded, great injustice would frequently ensue. The parties who rely on their testimony will still suffer an inconvenience,

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for the court and the jury are always most impressed by those witnesses who can draw and act a living picture before them of what they have seen, so that if there is any controversy as to the fact, such witnesses control; if there is no controversy as to it, the general testimony answers all useful purposes. The Supreme Court was right in granting a new trial on this ground; and the judgment and order granting such new trial should be affirmed.

Judgment accordingly.

Notes of other Cases on Intoxication.

People v. McLean, 37 State Rep., 628; s. c. 13 N. Y. Supp., 677; a non-expert may testify from what he saw, whether a person was intoxicated; s. p. McCarty v. Wells, 51 Hun, 171; McKillop v. Duluth St. Ry. Co., Minn., 1893, 53 Northwest. Rep., 739.

People v. Williams, 29 Hun, 520.

PEOPLE v. WILLIAMS.

General Term, Fourth Department, 1883.

[Reported in 29 Hun, 520; s. c. 1 Crim. R., 336.]

Upon a trial for murder, it being important for the prosecution to establish that a person was seen at a certain time and place,—*held*, error to allow a witness, testifying as to a man met by him on that night, to state his impression and thought at the time that the man met by him was such person.

The accused was indicted for murder, and evidence of his commission of the crime was given by an accomplice.

In the Court of Oyer and Terminer the accused was found guilty.

The General Term of the Supreme Court reversed the judgment.

HARDIN, J. It is now provided by statute that the testimony of an accomplice is not sufficient to warrant a jury in convicting an accused person of a crime. By chapter 360 of the Laws of 1882, section 399 of the Code of Criminal Procedure was amended so as to read as follows: "Section 399. A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime."

Prior to this statute a jury might convict upon the uncorroborated testimony of an accomplice, although courts were required, and it was their duty, to caution juries against rendering a verdict upon the uncorroborated evidence of an accomplice, and juries were advised not to convict on such testimony in the absence of confirmation of the material facts thereof by other evidence. (*People v. Costello*, 1 Denio, 83; *People v. Dyle*, 21 N. Y., 578; *Dunn v. People*, 29 *id.*, 523; *Lindsay v. People*, 63 *id.*, 154.)

In the case in hand we have found in the appeal book no direct and positive testimony, aside from that given by the accomplice, which connects the accused with the crime charged in the indictment; but many circumstances and some admissions

and declarations of the accused, when considered in connection with the positive testimony of the accomplice, tending to implicate the accused in the commission of the offense. In the circumstantial evidence relied upon by the people to implicate the accused and corroborate the accomplice, is the testimony given for the purpose of establishing that William Cortright was seen at the time and place narrated by Martin Teeter. It appears by this witness' evidence that he said, "I cannot swear that this man was Cortright" (whom he met) "I don't know whether it was he or not." When the witness was asked if he had an impression who it was, the defendant's counsel objected to it as incompetent. The objection was overruled, and the defendant excepted. The witness was permitted to answer, viz.: "I don't know for certain, only whom I thought it was; I thought it was William Cortright, but I don't know; I had known him for a number of years, and seen him frequently." After this ruling the district attorney propounded the following question, viz.: "It was your impression at the time?" and the witness answered, "Yes, sir." Following this answer the appeal book shows that the defendant asked to have the testimony of this "witness about passing this man stricken out," and that the court refused, and the defendant took an exception. In these several rulings occurring in the testimony of this witness, Teeter, we think there was error. First. It expressly appears by the testimony that the witness was not able to identify positively or upon knowledge the person he met as that of William Cortright. The most that he could say was, that he had an impression who it was, and that he "thought it was William Cortright." We are of the opinion that such impression and such "thought" of the witness ought not to have been received, or, having been received, ought to have been stricken out upon the defendant's motion. (*People v. Wilson*, 3 Parker's Crim. Rep., 206.)

STRONG, J., says in the case last cited: "Ordinarily the question of identity is one of fact, and a witness may be asked whether he knows a particular individual, and if so, whether he is the person indicated; but the question put to this witness is not the ordinary one of identity. It calls for an opinion relative to a body which, if that of the deceased, had been submerged in

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salt water for upwards of five months, and had undergone many changes. The witness can only state a conclusion drawn from the points of resemblance mentioned by him. The jury have heard his statements, and it is for them, and not the witness, to decide whether the body was that of the deceased captain." The question must be rejected.

Again, if a witness could be allowed to testify to an impression, to a "thought at the time," it would be difficult to predicate and establish perjury in respect to such answers. We are of the opinion that the usual course upon trials is to require the witness to state knowledge, recollection or memory of facts in respect to the identity of individuals, and not to allow them in the first instance, as evidence in chief, to state "impressions" or "thoughts," in respect to the identity of individuals. It appears to us the rule was departed from in receiving and retaining the testimony of the witness, Teeter. We cannot say this erroneous evidence was not prejudicial to the rights of the accused. We are not able to say that it had no influence in producing the verdict rendered against the accused; nor can we say that "if his evidence was struck from the case the proof of defendant's guilt" would be clear and overwhelming; and we can say, therefore, that the rule found in the Gonzales case is not applicable. (*People v. Gonzales*, 35 N. Y., 58.)

[*A ruling on another point is here omitted.*]

Judgment and conviction reversed, and new trial ordered in the Oyer and Terminer of Wayne County, to which court these proceedings are remitted, with directions to proceed.

NOTE: In *Brotherton v. People*, 75 N. Y., 159, an indictment for murder, the admissibility of an *ante mortem* declaration of the deceased was objected to on the ground that the evidence did not show a proper foundation for its admission, and that it was a statement of opinion merely, and not of facts. On this point, CHURCH, CH. J., said: "The deceased was shot on Thursday evening, and from that time he was apprehensive that the wound was fatal, but no declarations were allowed by the judge until Saturday, a short time before he became unconscious. On Friday the deceased repeatedly stated that he would not recover, and on Saturday morning he was told by his physician that he must die, and there is not a doubt from the evidence but that he believed so himself. (1 Greenl. on Ev., § 158.) Nor is the other ground tenable. The prisoner approached the deceased, disguised as a tramp, and the deceased stated, that at first

Schwartz v. Wood, 51 N. Y. St. Rep., 4.

he did not recognize him, but that when he drew the pistol 'and commenced his pranks,' he knew that it was the prisoner. The deceased was the son-in-law of the prisoner, and was intimately acquainted with him, and his language indicates that he spoke from knowledge derived from personal observation."

SCHWARTZ v. WOOD.

N. Y. Supreme Court, General Term, First Department, 1893.

[Reported in 51 N. Y. St. Rep., 4; s. c. 21 N. Y. Supp., 1053.]

A person, who has been shown to be well acquainted with another, is competent to testify as to whether or not a bust is a likeness of the latter.

Plaintiffs sued for breach of contract, upon the defendant's refusal to accept a number of busts of Rev. T. DeWitt Talmage; the contract provided that the busts should be perfect likenesses.

The facts upon which the ruling was made sufficiently appear in the opinion.

Plaintiffs recovered judgment upon report of a referee.

The General Term of the Supreme Court reversed the judgment.

O'BRIEN, J. [*after passing on other points*]: Another serious error was that committed in the ruling of the referee excluding the entire testimony of a witness called for the defendant to prove that the busts were not a likeness of Mr. Talmage, or of any resemblance whatever. When the introductory question was put to this witness as to how long he had been acquainted with Mr. Talmage, it was objected to upon the ground that the defendant should not be allowed to prove anything by this witness; and notwithstanding the statement of counsel that this witness was a trustee of the Brooklyn Tabernacle, and had been for many years, and was well acquainted with Mr. Talmage, and that he was competent as a witness upon the question of whether the bust was a likeness of Mr. Talmage or not, he was prevented at the very outset from testifying,

Notes on Identity, Likeness, etc.

the referee excluding it upon the ground that such evidence would not qualify him as an expert. Or, to put it in the referee's own language, he sustained the objection saying, "I shall exclude any further evidence that does not qualify as expert evidence." We think that in this the referee erred. As well said in *Barnes v. Ingalls*, 39 Ala., 193:

"Although experts only may be competent as witnesses to testify whether or not a photograph is well executed, yet, to enable a person to determine whether the picture resembles the original requires no special skill or knowledge of the photographic art, and on that question, consequently, a person for whom such a picture has been taken, although possessing no special skill or knowledge of the art, may testify that the picture was a good likeness. The fact of likeness or resemblance is one open to the observation of the senses, and no peculiar skill is requisite to qualify one to testify to it."

BARRETT, J., concurs. VAN BRUNT, P. J., took no part.
Judgment reversed.

NOTES OF OTHER CASES ON IDENTITY, LIKENESS, ETC.

Alabama: *Barnes v. Ingalls*, 39 Ala., 193; *Hodge v. State*, 1893, 12 Southern Rep., 164 (it is error to allow witnesses to give their opinions that foot-tracks seen near the place of an alleged murder were made by the same persons as those which they saw elsewhere, or that the impressions from defendant's shoes were the same as other footprints); s. p. *Riley v. State*, 88 Ala., 193; s. c. 7 Southern Rep., 149. *Georgia*: *Traveler's Ins. Co. v. Sheppard*, 85 Ga., 751; s. c. 12 Southeast. Rep., 18 (where a witness testifies that a photograph is a likeness of a person seen alive since the date of an alleged death, evidence of another witness in rebuttal that the first witness, when previously shown the photograph, had declared it to be the likeness of a different person is irrelevant). *Indiana*: *Miller v. Louisville, etc., R. Co.*, 1891, 27 Northeast. Rep., 339 (a witness may testify that a photograph introduced in evidence is a correct representation of the surroundings of a certain locality). *Massachusetts*: *Commonwealth v. Meserve*, 1891, 27 Northeast. Rep., 997 (the mere fact that a witness cannot read writing does not necessarily disqualify him from identifying a written paper). *New York*: *Schwartz v. Wood*, 51 State Rep., 4; s. c. 21 N. Y. Supp., 1053 (in an action for a bust which

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defendant had refused to accept on the ground that it was not a good likeness of the person to be represented, intimate acquaintances of such person may testify as to whether the bust is like him). *Texas*: *Fulcher v. State*, 28 Tex. App., 465 (upon a trial of one charged with murder, testimony that decedent "identified" defendant is admissible as a shorthand rendering of the facts). *Buzard v. McAnulty*, 77 Tex., 438; s. c. 14 Southwest. Rep., 138 (a witness acquainted with a person's signature cannot testify that an alleged photograph of it is a true likeness). *Clark v. State*, 28 Tex. App., 189; s. c. 12 Southwest. Rep., 729 (upon the trial of one indicted for robbery, testimony that certain tracks corresponded with defendant's shoes is admissible); s. p. *Crumes v. State*, 28 Tex. App., 516; s. c. 13 Southwest. Rep., 729. *West Virginia*: *State v. Harr*, 1893, 17 Southeast. Rep., 794 (a witness who testifies that he knows a person may be asked as to his belief as to such person's identity).

McCarragher v. Rogers, 120 N. Y., 526.

McCARRAGHER v. ROGERS.

New York Court of Appeals, Second Division, 1890.

[Reported in 120 N. Y., 526.]

The question whether a plaintiff suing for personal injuries was acting in a careless or careful manner,—*held*, objectionable as calling for a conclusion of a witness; the evidence of witnesses must be confined to a statement of the facts.

Plaintiff sued to recover damages for an injury received while operating a machine in defendant's factory. The questions presented were, whether the accident was attributable to defendant's negligence, and whether plaintiff was free from fault.

The facts material to the ruling on the question of evidence sufficiently appear in the opinion.

At *Circuit*, judgment was entered upon a verdict for plaintiff.

The General Term affirmed the judgment, without, however, passing on the particular question.

The Court of Appeals affirmed the judgment.

BRADLEY, J. [*after reviewing other exceptions*]: A witness who was in the service of the defendant was called by the latter and asked to state whether, from his knowledge of the plaintiff's conduct while at the press, he was generally careless or careful; also, whether or not, from what he saw of the plaintiff just at the time of the accident and before it occurred, he was acting in a careful or careless manner while sitting at the press. The evidence thus offered was excluded and exception taken. It did not appear that the witness was present at the time of the accident or saw its occurrence. He had been there shortly before and observed the conduct of the plaintiff, to which he testified. Whether the plaintiff was careless, depended upon the manner he conducted himself, and when that appeared, the conclusion whether the accident or injury was, to any extent, attributable to his want of care, was for the jury, and that was a question upon the determination of which the result of the action was dependent. It was not one for expert evidence resting in opinions of

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witnesses. The fact of care or carelessness of the plaintiff was not one involving any question of skill or science to determine, nor was it founded upon any knowledge peculiar to any class of persons. His conduct, as bearing upon the question of care or want of care, was susceptible of such description as to convey information of it to common understanding, and to enable the jury intelligently to determine it and the relation it had to the accident. In such case the evidence of witnesses must be confined to a statement of facts, and their opinions or conclusions derived from them are not competent. And the numerous cases cited by the defendant's counsel do not seem applicable to the question here. (*Van Wycklen v. City of Brooklyn*, 118 N. Y., 424; *Schwander v. Birge*, 46 Hun, 66.) The evidence of this witness, as to what he saw a short time before the occurrence, tended to prove that the attention of the plaintiff was more or less diverted from his work, and this was properly matter for the consideration of the jury, as bearing upon the question of the care he exercised when he was hurt shortly after, although it may not necessarily have characterized his conduct at that time.

All concur (HAIGHT and BROWN, JJ., not sitting), except PARKER, J., dissenting.

Judgment affirmed.

NOTE: In *Carpenter v. Eastern Transportation Co.*, 71 N. Y., 574, a collision case, a witness was asked on defendant's behalf, "Did Mr. Carpenter, in your opinion as a canal boatman, in any way omit or neglect to do anything which he might have done to save his boat?" Excluded, on objection. *Held*, that the question was clearly improper. An expert may be asked whether certain acts which are proven are seamanlike and proper under a given state of circumstances; but he cannot be allowed to express an opinion as to the care or carelessness of what was or was not done as a matter of fact.

In an action for damages arising from an accident in which plaintiff's intestate, the fireman on the locomotive derailed, was killed, the engineer of the train was asked, as a witness, how the deceased performed his duties, and also whether he understood the working of the engine. The answer was, "He always ran her well while he was with me; that is, when I asked him to move her one way or another he done so."

This evidence was objected to.

Held, that the evidence was proper, LEARNED, P. J., observing that "it would hardly be possible for a witness to describe the work which he had seen a mechanic do so that the jury could judge as to his skill." *Wheeler v. Delaware, etc., Canal Co.*, 20 Weekly Dig., 301.

NOTES OF OTHER RECENT CASES ON TESTIMONY TO CARE, DANGER, ETC.

Alabama: *Louisville, etc., R. Co. v. Watson*, 90 Ala., 68; s. c. 8 Southern Rep., 249 (plaintiff, a brakeman, whose hand was crushed while coupling a car, may testify that the engineer backed the train with unnecessary force). *Birmingham Mineral R. Co. v. Wilmer*, 1893, 11 Southern Rep., 886 (in an action by a railroad employee for personal injuries caused by falling from the train, plaintiff may testify that the jerk of the train which caused the fall was an unusually hard one). *Arkansas*: *Little Rock & M. Ry. Co. v. Shoecraft*, 56 Ark., 465; s. c. 20 Southwest. Rep., 272 (in an action against a railway company for killing cattle, where the locomotive engineer has testified that he sounded the stock alarm, put on brakes and reversed his engine, it is not prejudicial error not to permit him and the fireman to testify that they did all they could do to avoid hitting the cattle). *St. Louis, etc., R. Co. v. Tarborough*, 56 Ark., 612; s. c. 20 Southwest. Rep., 515 (in an action for causing the overflowing of lands, a non-expert cannot testify as to whether defendant's embankment caused it, since all the facts could be perfectly described to the jury). *Georgia*: *Mayfield v. Savannah, etc., R. Co.*, 87 Ga., 374; s. c. 13 Southeast. Rep., 459 (in an action for personal injuries it is not error not to permit plaintiff to testify in general terms that he acted cautiously). *Kendrick v. Central R. & B'k'g. Co.*, 89 Ga., 782; s. c. 15 Southeast. Rep., 685 (a witness cannot be asked whether, if defendant's engineer had paid attention to the signals, plaintiff's intestate would have been killed). *Central R. Co. v. Ryles*, 84 Ga., 420; s. c. 11 Southeast. Rep., 499 (it is not error to exclude testimony that a train was backed very carefully and that nothing was done carelessly or negligently). *Illinois*: *Kolb v. Sandwich Enterprise Co.*, 36 Ill. App., 419 (a witness cannot give his opinion whether a trap-door was dangerous for employees). *Illinois Cent. R. Co. v. Blye*, 43 *id.*, 612 (in a passenger's action for personal injuries, where one of the issues was whether the plaintiff had been given a sufficient opportunity to alight, a witness cannot testify that she had a sufficient opportunity if she had proceeded right out of the car). *Indiana*: *City of Elkhart v. Witman*, 122 Ind., 538; s. c. 23 Northeast. Rep., 796 (it is not error to permit a witness to testify that there were defects in a sidewalk). *Sherfey v. Evansville, etc., R. Co.*, 121 Ind., 427; s. c. 23 Northeast. Rep., 273 (it is not error to exclude testimony that deceased was as far off the track as he could be before the train sucked him under). *Pennsylvania R. Co. v. Mitchell*, 124 Ind., 473; s. c. 24 Northeast. Rep., 1065 (it is not error to exclude a witness'

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opinion as to whether a cattle guard could be maintained at a particular place without increasing the danger of trainmen). *Brunker v. Cummins*, 1893, 32 Northeast. Rep., 732 (where plaintiff was injured by falling over a barrel on a sidewalk, it is error to admit testimony to the effect that a person could walk between the barrel and the building with safety). *Citizens' Street Ry. Co. v. Spahr*, Ind. App., 1893, 33 Northeast. Rep., 446 (in a passenger's action for injuries it is not error to exclude the testimony of a witness for defendant that people were not in the habit of trying to get on cars at the rate of speed the car in question was going). *Iowa: Butler v. Chicago, etc.*, R. Co., 1893, 54 Northwest. Rep., 208 (in an action for causing death by the alleged unskillfulness of defendant's engineer, a witness cannot testify as to the engineer's skill). *Michigan: Kelley v. Detroit, etc.*, R. Co., 1890, 45 Northwest. Rep., 90 (it is not error to exclude the testimony of a witness who saw plaintiff fall, as to whether it occurred to him at the time that the accident happened by reason of the darkness). *Girard v. City of Kalamazoo*, 92 Mich., 610; s. c. 52 Northwest. Rep., 1021 (it is not error to exclude witness' opinion as to whether a walk was in reasonable repair or reasonably safe for public travel). *Missouri: Hamilton v. Rich Hill Coal Min. Co.*, 108 Mo., 364; s. c. 18 Southwest. Rep., 977 (in an action for personal injuries plaintiff's witness cannot be asked on cross-examination as to whether it is negligent for a person who has business with a railroad to stand on a track immediately in front of a moving car). *New Hampshire: Wells v. Eastman*, 61 N. H., 507 (a witness may give his opinion as to negligence of setting fire to brush in a high wind, and in the management of the fire, where he has observed the wind and acts of the defendant). *New York: Murtaugh v. N. Y. Central, etc.*, R. Co., 49 Hun, 456 (a question which seeks to substitute the opinion of a witness as to prudence and care for that of the jury is inadmissible). *McDonald v. State*, 127 N. Y., 18; s. c. 27 Northeast. Rep., 358; 37 State Rep., 248 (upon a claim for damages caused by the giving away of a bridge, testimony of one who made alterations in the bridge that in his judgment the change left the bridge safe for ordinary uses as a highway is inadmissible). *Ivory v. Town of Deerpark*, 116 N. Y., 476; s. c. 22 Northeast. Rep., 1080 (a witness' opinion as to the comparative danger between particular places on a highway is not competent). *Schneider v. Second Ave. R. Co.*, 133 N. Y., 583; s. c. 30 Northeast. Rep., 752 (in an action for personal injuries caused by a defective brake, a witness, who has testified that the striking of the brake with a hammer, would have revealed the defect, cannot state that in his opinion the inspection that had been made was insufficient). *Mauer v. Ferguson*, 17 N. Y. Supp., 349 (in an action for death caused by the breaking of a scaffold, a witness cannot testify whether, in his opinion, the scaffold was put up right). *Oregon: Johnston v. Oregon, etc. Ry. Co.*, 1893, 31 Pacific Rep., 283 (in an action for the killing of a switchman who was riding on the ladder of a freight car, the person, who picked up deceased after the accident, cannot testify as to whether it was negligent for the deceased to so ride). *Pennsylvania: Graham v. Pennsylvania R. Co.*, 139 Pa. St., 149; s. c. 21 Atlantic Rep.,

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151 (it is error to permit a witness to give his opinion that a station platform was dangerous, where the character of the platform can be fully described to the jury). *McNerney v. City of Reading*, 150 Pa. St., 611; s. c. 25 Atlantic Rep., 150 (in an action against a city a witness, who has examined an area and has requisite skill to speak intelligently on the subject, after describing the area, may give his opinion as to its dangerous character). *South Carolina: Bridger v. Ashville, etc.*, R. Co., 25 S. C., 24 (a witness may state upon his knowledge of the character and location of a turntable, that it is dangerous for children to ride on it). *Texas: Fort Worth, etc. Ry. Co. v. Thompson*, Tex. Civ. App., 1893, 21 South-west. Rep., 137 (a witness cannot testify as to whether or not the defendant railway was ordinarily careful in keeping its tracks in good condition). *United States: Inland & S. Coasting Co. v. Tolson*, 139 U. S., 551; s. c. 11 Supm. Ct. Rep., 653 (in an action for negligence a witness cannot give his opinion as to whether the place where the plaintiff stood was reasonably safe). *Washington: Sears v. Seattle, etc.*, R. Co., 1893, 33 Pacific Rep., 389 (a witness, after testifying as to a cable car's rate of speed and the motorman's effort to stop it, may testify that the latter was unable to do so because he was running at a too high rate of speed).

Notes of Cases on Ownership and Possession.

NOTE.—In *De Wolf v. Williams*, 69 N. Y., 621, where ownership of furniture was in issue, plaintiff was asked: "Whose was the property in the house?" and answered, that it was her own. *Held*, proper; for title to property is ordinarily a simple fact, to which a witness having the requisite knowledge may testify directly. *

In *Boyle v. Williams*, 1 Delehanty, 112, an action for conversion, defendant was called as a witness by plaintiff, and was asked on cross-examination: "Did you take possession of these goods as assignee?" *Held*, proper to exclude the question as calling for a conclusion.

In *Potter v. Weidman*, 20 N. Y. Weekl. Dig., 110, an action by an assignee of a judgment against the original judgment creditors, upon a breach of a covenant in the assignment that they would not release nor discharge the judgment, the judgment debtor was asked to state whether he owned certain real property. Objected and excepted to, on the ground that title to real estate could not be proved in that way. *Held*, that as the fact was only incidentally in issue, it might be proved by the witness who had knowledge of it; that his deeds were not so involved in the controversy as to require their production as the best evidence of the fact.

In an action for conversion, where the question was whether the defendants had come lawfully into possession of the property, the plaintiff, as a witness, was asked whether he at any time delivered possession of the boat to the defendants or either of them.

This was objected to as calling for a conclusion of the witness.

Held, that the exclusion of the answer was error.

Collins v. Manning, 1 N. Y. State Rep., 204.

NOTES OF OTHER CASES ON TESTIMONY ON OWNERSHIP AND POSSESSION.

Alabama: *Woodstock Iron Co. v. Roberts*, 87 Ala., 436; s. c. 6 Southern Rep., 349 (a witness may testify that defendant in ejectment went into possession and thereafter controlled the land; the statement as to control being a statement of a collective fact); *Steiner v. Trantum*, Ala., 1893, 13 Southern Rep., 365 (ownership of personal property is a fact to which a witness may testify). *California*: *Bunting v. Salz*, 22 Pacific Rep., 1132, reversed upon other grounds upon rehearing in 84 Cal., 168; s. c. 24 Pacific Rep., 167 (for the purpose of showing an invalid sale as to attaching creditors, a witness may be asked whether the debtor exercised any acts of ownership or control over the property). *Illinois*: *Bahe v. Baker*, 44 Ill. App., 578 (in trespass for carrying away property plaintiff cannot testify that defendant took property belonging to him). *Iowa*: *Benjamin v. Shea*, 83 Iowa, 392; s. c. 49 Northwest. Rep., 989 (a witness cannot tes-

* Compare with *Nicolay v. Unger*, at p. 252 of these cases, where a witness was not allowed to testify whether a transaction was a sale or not.

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tify as to his ownership of land when such ownership is in issue). *Kansas*: *Hite v. Stimmell*, 1891, 25 Pacific Rep., 852 (a witness cannot testify as to ownership of cattle where it is the principal fact to be proved). *Missouri*: *W. W. Kendall Boot & Shoe Co. v. Bain*, 46 Mo. App., 581 (where the question of possession is one of mixed law and fact it is error to permit a witness to testify as to who had possession). *New York*: *Boyle v. Williams*, 1 Misc. R., 112; s. c. 20 N. Y. Supp., 727 (in conversion, defendant cannot testify that he took possession of the property as assignee). *North Carolina*: *Bryan v. Spiney*, 109 N. C., 57; s. c. 13 Southeast. Rep., 766 (testimony that a person was in possession of land in the ordinary sense of a layman is a statement of fact). *Texas*: *Johnston v. Martin*, 81 Tex., 18; s. c. 16 Southwest. Rep., 550 (it is not error to exclude the testimony of a mortgagor that he owned no homestead except the land in controversy); *Howard v. Zimpelman*, 1892, 14 *id.*, 59 (a witness cannot testify that persons are joint owners of land).

ADMISSIONS AND DECLARATIONS.

NOTE ON WITNESS REHEARSING CONVERSATION OF OTHERS.

The following are the most important rules which guide the examination of witnesses as to conversations of others heard by them :

1. To enable a witness to testify to an admission, it is not necessary that he should have heard or understood the whole of the conversation.
2. It is not necessary that the witness should be able to testify to the exact language ; but he must be able to give the substance.* He may state the impressions of his mind as to the fact of what he said, but not what he understood to be meant by what he testifies was said.†
3. The witness, testifying to a conversation, cannot state his understanding as to what or who was referred to by language which requires explanation, unless he is limited to his understanding from the conversation itself.
4. A conversation with a party ignorant of the language, being had through the medium of his friend and agent as an interpreter in his presence, that which was said to and by the interpreter in English is competent against the party.
5. Dying declarations, made by pressing the hand in answer to inquiry when unable to speak, may be proved.
6. The receiver or hearer of a message, through the telephone, may testify to the identity of the person speaking through the instrument, if he had had previous conversations with him through the instrument and otherwise, and at the time of the conversation in question recognized his voice through the instrument.
7. The identity of a speaker may be proved by other evidence than the testimony of the one whom he addressed through the telephone.
8. If a person or corporation has a telephone instrument in his place of business, the response received through it, to a communication addressed to him, is competent against him without evidence to identify the speaker.
9. If it be shown that the person serving as operator at the telephone was requested or authorized by the speaker to act for him in speaking through the instrument, or in hearing the message through the instrument, and repeating it to the receiver, he may be regarded as the agent of

* According to some Massachusetts authorities, he must be able to give the substance of the *language*. The New York practice allows him to give the substance of the conversation or statement, without restricting him to the substance of the language.

† On this point compare with authorities below indicated, and Abb. Crim. Br., § 503.

Note on Others' Admissions, etc.

the speaker, and his interpretation of the message to the receiver binds the speaker, and may be proved by any witness who heard it.

10. Under the rule that a party whose admissions are proved has a right to have all that was said by the same person in the same conversation in any way qualifying or explaining the part adduced against him, or tending to destroy or modify the use sought to be made of it, but no more; the burden is upon him to show affirmatively the simultaneousness of the qualifying parts he claims to prove.

[The authorities will be found in detail in Abbott's Brief on the Facts, sections 66, 67, 69, 295, 296, 698, 699, 700, 701, 81.]

Montana Railway Co. v. Warren, 137 U. S., 348.

MONTANA RAILWAY CO. v. WARREN.

United States Supreme Court, 1890.

[Reported in 137 U. S., 348.]

The amount of knowledge which a witness must possess to be competent to express an opinion as to the value of land rests largely in the discretion of the trial judge. Knowledge of actual sales is not essential.

The Montana Railway Co. took appropriate proceedings for the condemnation of a right of way over a certain mining claim in Silver Bow County, Montana.

Damages having been assessed at \$1,552, the defendants appealed to a District Court of the county where the case was tried by a jury.

On the trial, several witnesses, having testified that they knew the land, and many of them that they had dealt in mining claims in the district and had opinions as to the value of the property, were permitted against plaintiff's objection to give their opinions as to the value of the land.

In the *District Court of the Second Judicial District of Silver Bow County*, a verdict of \$7,000 was returned for the defendants and judgment entered. The plaintiff appealed.

The Supreme Court of the Territory of Montana affirmed the judgment.

The Supreme Court of the United States affirmed the judgment.

BREWER, J. [*as to the point in question*]: There remains for consideration but a single point—that there was admitted in evidence on the trial the opinions of witnesses as to the value of the land, which were not based upon the sale of the same or similar property, and were not, therefore, the opinions of persons competent to so testify. It appears that the land taken was a strip running through a mining claim, which had been patented and belonged to the defendants in error. The claim adjoined the Anaconda mining claim, which had been developed and

worked, and demonstrated to contain a vein of great value. The claim in controversy had been developed so far as to indicate that possibly, perhaps probably, the same rich vein extended through its territory. It had not been developed so far that this could be affirmed as a fact proved. The strip taken ran lengthwise through the claim; and, upon the trial, witnesses were permitted to testify as to their opinion and judgment of its value. It may be conceded that there is some element of uncertainty in this testimony; but it is the best of which, in the nature of things, the case was susceptible. That this mining claim, which may be called "only a prospect," had a value fairly denominated a market value, may, as the Supreme Court of Montana well says, be affirmed from the fact that such "prospects" are the constant subject of barter and sale. Until there has been full exploiting of the vein its value is not certain, and there is an element of speculation, it must be conceded, in any estimate thereof. And yet, uncertain and speculative as it is, such "prospect" has a market value; and the absence of certainty is not a matter of which the railroad company can take advantage, when it seeks to enforce a sale. Contiguous to a valuable mine, with indications that the vein within such mine extends into this claim, the railroad company may not plead the uncertainty in respect to such extension as a ground for refusing to pay the full value which it has acquired in the market by reason of its surroundings and possibilities. In respect to such value, the opinions of witnesses familiar with the territory and its surroundings are competent. At best, evidence of value is largely a matter of opinion, especially as to real estate. True, in large cities, where articles of personal property are subject to frequent sales, and where market quotations are daily published, the value of such personal property can ordinarily be determined with accuracy; but even there, where real estate in lots is frequently sold, where prices are generally known, where the possibility of rental and other circumstances affecting values are readily ascertainable, common experience discloses that witnesses the most competent often widely differ as to the value of any particular lot; and there is no fixed or certain standard by which the real value can be

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ascertained. The jury is compelled to reach its conclusion by comparison of various estimates. Much more so is this true when the effort is to ascertain the value of real estate in the country, where sales are few, and where the elements which enter into and determine the value are so varied in character. And this uncertainty increases as we go out into the newer portions of our land, where settlements are recent and values formative and speculative. Here, as elsewhere, we are driven to ask the opinions of those having superior knowledge in respect thereto. It is not questioned by the counsel for plaintiff in error that the general rule is that value may be proved by the opinion of any witness who possesses sufficient knowledge on the subject; but their contention is, that the witnesses permitted to testify had no such sufficient knowledge. It is difficult to lay down any exact rule in respect to the amount of knowledge a witness must possess; and the determination of this matter rests largely in the discretion of the trial judge. *Stillwell & B. Manufacturing Co. v. Phelps*, 130 U. S., 520; *Lawrence v. Boston*, 119 Mass., 126; *Chandler v. Jamaica Pond Aqueduct Corporation*, 125 Mass., 544. The witnesses whose testimony is complained of, all testified that they knew the land and its surroundings; and many of them that they had dealt in mining claims situated in the district, and had opinions as to the value of the property. It is true, some of them did not claim to be familiar with sales of other property in the immediate vicinity; and the want of that means of knowledge is the specific objection made in the Supreme Court of the Territory to the competency of those witnesses. But the possession of that means of knowledge is not essential. It has often been held that farmers living in the vicinity of a farm whose value is in question, may testify as to its value although no sales have been made to their knowledge of that or similar property. Indeed, if the rule were as stringent as contended, no value could be established in a community until there had been sales of the property in question, or similar property. After a witness has testified that he knows the property and its value, he may be called upon to state such value. The means and extent of his information, and therefore the worth of his opinion, may be

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developed at length on cross-examination. And it is fully open to the adverse party, if not satisfied with the values thus given, to call witnesses in the extent of whose knowledge and the weight of whose opinions it has confidence.

We think the Supreme Court of Montana was right in holding that no error was committed in permitting the testimony of these witnesses.

Judgment affirmed.

In *Whitney v. City of Boston*, 98 Mass., 312, it was *held*, not error to exclude testimony as to the value of real estate in Boston, which was in controversy, from a shoemaker whose only knowledge of the subject was that he had hired one of the buildings on the land, for five years, occupying the upper stories and under-letting the lower story; and that he had resided in this country for seventeen years, hiring and occupying during that time five different houses in different parts of the city; on the ground that the witness was not shown to have had sufficient dealing and experience in real estate to entitle him to give an opinion.

ROBERTS v. N. Y. ELEVATED R. R. CO.

New York Court of Appeals, 1891.

[Reported in 128 N. Y., 455.]

In an action against an elevated railroad for an injunction and for damages, expert testimony as to what the present value of the abutting property would have been if the structure and road were not in front of it, is incompetent evidence upon which to predicate the measure of damages.

An abutting owner sued to enjoin the elevated road.

The Special Term granted the injunction, with the usual condition that defendants might pay the value of the easements.

The General Term of the Superior Court affirmed the judgment without reported opinion.

The Court of Appeals reversed the judgment.

PECKHAM, J. [*after stating the facts*]: Whether the value of the property would have been still greater without the road than it now is with it, was the fact to be found by the court.

Upon the trial a witness was called on behalf of the plaintiff

and testified that he was a real estate broker and had carried on that occupation in the city of New York for twenty-eight years; his transactions had extended throughout the whole city, and had involved both leasing and selling; he knew the property in question, and was familiar with the value of that property and of the property in the neighborhood; he had made an examination of the property with a view of seeing what physical effects to the abutting property were produced by the railroad and its trains, commencing at least six months ago, on four or five different occasions; he had given special attention to the effect upon abutting property, produced by the elevated railroad and the passing of its trains; he had been examined a large number of times as a witness on the subject and in reference to property scattered all over the city; he had made it his business to be familiar, not only with the selling, but the rental values of property along Third avenue, since the railroad came there; he had informed himself about such transactions, not only in reference to this property, but other property; so far as experience from personal transactions was concerned, he had none in that vicinity since the building of the railroad, in renting or in selling; he had been engaged by property owners for the last three years to make examinations and testify as an expert witness, and it had been a considerable part of his business, and in every case in which he had testified he had testified against the railroad company; he was paid \$100.00 to come and give these opinions; he did not know but that the property at the upper end of Third avenue had been benefited to some extent; his opinion was that rapid transit had helped Harlem; the building up of the upper end of Harlem had been due to the growth and filling up of all the cross streets; the growth and filling up of the cross streets had been due to the rapid transit afforded by the elevated railroad in large part.

The following question was put to him: "To what extent, if at all, in your judgment, is the value of Mr. Robert's four buildings on the Third avenue—excluding from consideration the house on Ninety-ninth street; to what extent, in your judgment, is the value of that property damaged, if at all, by the presence of the structure and the running of the trains?"

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Under objection and exception the answer was permitted, and the witness stated that the diminution extended from about \$110,000 to \$80,000, including the loss to the fee value simply.

The court then said: "That is, you think that the four houses fronting on Third avenue are worth \$80,000 now?"

Witness: Yes, sir.

Court: And that they would be worth \$110,000 if the structure and road were not there?

Witness: Yes, sir.

Q. What do you estimate the rental value of the property to be, the railroad not being there? I refer to the Third avenue front only.

Same objection and exception.

A. \$9,000.

Q. And the railroad being there?

A. \$6,400; as collectible rents, I mean."

Upon this appeal the question is, were these objections of the defendant properly overruled?

By resorting to a court of equity and seeking the aid of the court to prevent the operation of the defendant's road until all his damages consequent upon the illegal construction of its road in front of his premises have been paid once for all, the plaintiff has brought before the court the question, what were the damages to the fee of the premises owned by him, consequent upon this wrongful act of the defendant?

The amount of damages thus caused to the plaintiff's fee is the precise question which the court or jury must determine, and for such amount the court gives judgment upon condition of the plaintiff executing a deed to the defendant of the property wrongfully taken or interfered with by it.

The first question asked the witness, to which exception is taken, as above noted, calls for his opinion as to the amount of such damage, and the second question is of substantially the same nature, except that it refers to the injury to the rental value of the property instead of the injury to the fee. The precise and specific question which is to be determined by the court and jury is by this interrogatory placed before the witness for his opinion and decision. To permit it to be asked and answered is,

beyond all question, against the great mass of authority in this and other states.

It is now asked that this court, in view of the alleged abnormal character of the litigation growing up in the city of New York, over the erection and operation of these elevated railroads, shall sanction in regard to them a departure from well established rules of law touching the admission of expert evidence. It seems to me that neither the nature nor the extent of the litigation affords the slightest justification for such departure.

Expert evidence, so called, or, in other words, evidence of the mere opinion of witnesses, has been used to such an extent that the evidence given by them has come to be looked upon with great suspicion, by both courts and juries, and the fact has become very plain that in any case where opinion evidence is admissible, the particular kind of an opinion desired by any party to the investigation can be readily procured by paying the market price therefor. We have said lately that the rules admitting the opinions of experts should not be unnecessarily extended, because experience has shown it is much safer to confine the testimony of witnesses to facts in all cases where that is practicable, and leave the jury to exercise their judgment and experience on the facts proved. As is stated by EARL, J., in *Ferguson v. Hubbel* (97 N. Y., 507), "It is generally safer to take the judgments of unskilled jurors than the opinions of hired and generally biased experts."

It is the general rule that testimony should consist of facts and not opinions, and the admission of opinions forms an exception to that general rule. Mr. Justice COWEN said, in speaking of the opinions of witnesses as to the then present value of real estate, that they were barely admissible and that to receive them at all was a departure from the general rule of evidence, and that judges who preside at *nisi prius* sometimes have reason to regret that they should in practice form an exception. He referred to *Rochester v. Chester*, (3 N. H. 349, 364-366), where the court refused to receive the opinions of witnesses as to the value of land, even from those skilled in the market. They said the land must be described and the jury must then judge from the facts. (See matter of Pearl Street, 19 Wend. 654.)

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I refer to this not for the purpose of throwing any doubt upon the admissibility of expert evidence upon the question of the past or present value of real estate, where the witness is shown to be competent to give an opinion thereon. That was decided years ago by this court, and has been continuously approved since that time, see *Clark v. Baird*, 9 N. Y., 183; but I cite it for the purpose of showing the opinion of learned judges regarding evidence of this kind when it first came into practice and the questions thereon first came up for decision. The only inquiry here is whether this is one of these cases in which the testimony is allowable.

The precise question has been decided by this court as lately as the 117th N. Y. Rep., 219, in *McGean v. Manhattan Railway Co.* The question there asked was, "What would have been the fair rental value in the years 1879, 1880 and 1881 if the railroad had not been built? And we decided it to be improper. It was so held because it is merely speculative, and it is speculative upon the very question and upon the only question which the court or the jury is called upon to decide, and the question calls for the opinion of the witness upon that very subject. Some criticism has been made in regard to that case by the learned counsel for the plaintiff herein, and we are asked substantially to review it and to reverse our decision therein. We have carefully considered the arguments of counsel on both sides and have again looked through the cases decided in this court upon the subject, and we are unable to see that there has been any error in the McGean case, but, on the contrary, we think it is in strict conformity with the law as heretofore laid down by this court.

I shall refer to but a few of the cases cited by the appellant herein to sustain his claim that the court below erred in admitting the question in controversy. They are all contained in his very voluminous brief upon the subject submitted to us, and out of them the following are all I deem it necessary to comment upon. *Morehouse v. Mathews* (2 N. Y., 514) was an action brought by the plaintiff to recover damages for a breach of contract by the defendant in not feeding to the plaintiff's cattle as good hay as had been agreed upon. The plaintiff asked a witness what damage had occurred in consequence of feeding the cattle upon the

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hay in question instead of that agreed upon. Under objection, the witness answered, he thought the damage would be fifty dollars. This court reversed the judgment on the ground that the evidence had been erroneously admitted, and that the question called simply for the opinion of the witness as to the amount of damage sustained by the plaintiff.

Van Deusen v. Young (22 N. Y., 9) was an action under the Revised Statutes to recover treble damages for cutting trees on a certain piece of land owned by the plaintiffs, who were remainder men subject to a life estate. A witness was asked, "What, in your opinion, is the difference in value of the farm by the removal of the timber?" and also, "Would the farm be worth more or less with the timber cut off?" DAVIES, J., held the questions were objectionable as calling for a speculative opinion and not for facts, and referred to *McGregor v. Brown* (6 Seldon, 114): and MULLIN, J., said: "It is unquestionably competent for the witness to give his opinion as to the value of the farm with the timber on, and its value after it was taken off. The difference between the two may be the damages, and in cases where the damages are arrived at by merely subtracting one sum from another, it may seem to be refining over much to refuse the witness the right to make the subtraction himself and declare the result; for this is what he is called on to do when asked to give his opinion as to the amount of damages." The learned judge was speaking of a case where the witness knew the farm in question—knew it when the timber was on it and knew what its value then was, and the timber having been cut off, he knew what the value of the land was with the timber thus cut off. And yet in a case where the difference between the two would be the legal damages, it does not even then follow that a witness may be asked the bold question, "What amount of damages has the plaintiff sustained?" The reason is that the rule of damages is a question of law, and the witness, upon such a question, might adopt a rule of his own and hold the defendant responsible beyond the legal measure. In *Marcy v. Schults* (29 N. Y., 346) the court, per DENIO, J., held that a witness could not be allowed to state his opinion of the amount of damages. That was in an action for damages for raising a dam so as to overflow the plaintiff's

iff's house. The learned judge said the witness could describe the character of the overflow and its effect, and then it would be for the jury to estimate the damages; and what was offered was in substance an opinion as to the amount of the damages which the plaintiff had sustained by the wrongful act of the defendant.

This court, in *Green v. Plank* (48 N. Y., 669), in an action of replevin for a canal boat, reversed the judgment for the plaintiff, where the witness had been asked to state the damages for taking and withholding the boat during the time the defendant had it. In *Ferguson v. Hubbell* (*supra*), which was an action for damages for a fire, claimed to have been negligently set, from which the plaintiff sustained damage to his land, a farmer was called as a witness for defendant and asked the question, "What do you say as to whether it was a proper time or not to burn a fallow?" The testimony was said to have been erroneously admitted.

In *Van Wycklen v. City of Brooklyn* (118 N. Y., 424), the question of the admissibility of expert evidence is discussed and held to be allowable only when, from the nature of the case, the facts cannot be stated or described to the jury in such a manner as to enable them to form a correct judgment thereon, and no better evidence than such opinions is attainable.

In *Avery v. N. Y. Central, etc., Co.* (121 N. Y., 31), which was an action for damages on account of the violation of a covenant to keep a proper opening from the defendant's depot yard, opposite the plaintiff's hotel, the plaintiff was asked this question: "Do you know what the rental value of your Continental property, real and personal, would have been between the 10th day of September, 1881, and the 28th day of January, 1884, if there had been a sufficient opening kept and maintained by the defendant opposite your hotel, for the convenient access of passengers and their baggage to and from the twenty foot strip of land lying south of the hotel?" This evidence was held to be improper.

Judge GRAY, in delivering the opinion of this Court, said: "The witness should not have been permitted to give his opinion upon that head. His testimony should have been confined to stating facts. He might have described the condi-

tion of his property. He could have given evidence of what the defendant did to or upon the land over which he claimed to possess rights. He could have stated what his business was and what it amounted to at times prior and subsequent to any change in the situation and circumstances surrounding its conduct; and it would then be for the jury to draw the conclusions from the facts stated as to whether plaintiff had been injured by the defendant and what amount of damages he should recover."

In *Norman v. Wells* (17 Wend., 136), it was held by the old Supreme Court that the amount of indemnity, when it is not capable of being reached by computation, is always a question for the jury. It was stated that if there be any rule without exception, it is this, and the court was unable to find any instance where the opinion of a witness had been received upon that particular question. The action was on covenant for damages to the plaintiff by the erection of another mill on the same stream with plaintiff's mill, and a witness was asked the damages which in his opinion the plaintiff has sustained by reason of the erection of such mill. The question was allowed at circuit, and a new trial was granted for the error in allowing it. The learned counsel for the plaintiff has cited a number of cases on his side, which he claims are authorities for the question put to the witness herein. The briefs of both counsel exhibit untiring industry and research, and all the cases that have been decided involving questions of this nature both in this and other states would seem to have been found and cited on the one brief or the other. It is impossible to notice them all, and I shall not make the attempt. Special reliance seems to have been placed by the learned counsel for the plaintiff upon the cases I now refer to. In *Clark v. Baird* (9 N. Y., 183), the point decided was that the opinions of a witness acquainted with real estate, the value of which was in dispute, were competent upon the question of such value. It was an action on the case by the purchaser of a tavern stand against his vendor for fraudulently misrepresenting the boundaries of the land. A witness for the plaintiff testified that he had examined the tavern stand with a view of buying it, and that "it was worth

\$1,000, if it extended to the race and trees. The strip taken off would reduce it one-fourth." This testimony was objected to on the ground that the amount of damage could not be ascertained by the opinion of the witness. The objection was overruled and the defendant excepted. Part of the alleged fraud consisted in the statement that the tavern stand extended to the race and trees. The plaintiff claimed as a matter of fact it did not extend so far. The learned judge in the course of his opinion said that the witness had in substance stated the value of the stand, including all the land it was represented to include, and also in contrast with that statement, and as bearing upon the question of damages, had further stated the value of the stand excluding that part which, as the plaintiff contended, did not pass by the defendant's conveyance to the plaintiff by reason of his want of title. I do not see that the case affords any countenance for the claim of the plaintiff herein. The witness simply stated the value of the tavern as it stood, estimating that a certain amount of ground in plain view was attached to the stand, and then stated what in his opinion was the value of the land with that particular piece of land not included. Within any rule regarding the opinions of experts we think this evidence admissible.

In *Rochester & Syracuse R. R. Co. v. Budlong* (10 How. Pr., 289), which was a proceeding by plaintiff to take defendant's property by the right of eminent domain, the opinion of the General Term of the Supreme Court was delivered by Judge SELDON in 1854. It contains expressions which favor the views contended for here by plaintiff's counsel and it includes all that can be said in favor of the admission of this kind of evidence. The opinion has not been followed by the courts of this state, and many subsequent decisions of this court, some of which have already been cited, are at war with the doctrines announced by Mr. Justice SELDON. The case cannot be regarded as authority in this state at the present time. (See *Harpending v. Shoemaker*, 37 Barb., 270; *Simons v. Monier*, 29 *id.*, 419.)

In *Hine v. N. Y. Elevated R. R. Co.* (36 Hun, 293), which was an action brought to recover damages for the obstruction of light, air and access to the plaintiff's premises by reason of the

construction of the defendant's road, a real estate broker was called on the part of the defendant, who, after stating that he was familiar with the premises in question, was asked this question: "What has been the effect in your opinion of the elevated railroad upon the value of the property, so far as the items of light, air and access are concerned?" Upon the plaintiff's objection the question was excluded and the court held that this was error. The court in the course of the opinion, which was delivered by DAVIS, P. J., said that "the answer to the question should have been received. The witness was an expert, and that fact was sufficiently shown to entitle him to express an opinion on the subject. The opinion called for related to the precise question of damages which, as will be seen, the court submitted to the jury, and there is no reason why the opinions of experts are not admissible upon those questions." No case is cited in the opinion and what I have quoted is all the learned judge said in regard to the admissibility of evidence of this kind. The case is not in harmony with the cases in this court and should not be followed. The evidence is open to all the objections spoken of, in that it puts the witness in the place of the court and jury, and is only his opinion upon the very point to be decided by them.

In *Kenkele v. Manhattan Railway Co.* (55 Hun, 398), an action similar to the one at bar and where, as here, the defendant had neglected to take proceedings to condemn the property of the plaintiff, the General Term of New York held that the measure of damages was the difference at the time of the trial between the value of the property to which the easements were appurtenant, with the easements, and its value without them. The manner of proving such difference was not discussed. Mr. Justice VAN BRUNT in the course of his opinion in that case, after stating what he regarded as the true rule of damages, said: "We do not think that the Court of Appeals has as yet condemned the rule. Until they do, justice seems to require that it should be followed." It is stated as one of the grounds for the motion for a new trial in that case, that incompetent evidence upon the subject of damages had been given, but it does not appear what that incompetent evidence was. The

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learned judge said: "The evidence as to the value of these easements is necessarily, from the very nature of the case, somewhat conjectural, and stringent and strict rules are not to be applied where they would deprive the owner of all proof of damage, as we are dealing with the damage done by a trespasser; and, while damages should be proven with reasonable certainty, the rights and interests of the owner of these easements should not be sacrificed."

This is undoubtedly true. Continuing, the learned judge said: "What more certain evidence of the value of these easements can be given than by proof of what the property to which they are appurtenant would now be worth with the easements, and what it is worth without these easements?"

Evidence as to what the value of the property would be with the easements alluded to, unaffected by defendant's acts, is proper. No dispute arises on that point. The controversy arises when the fact of that value is to be sworn to as an opinion by a so-called expert, and which opinion, speculative and uncertain as it must be, is directed to the very point which the jury is to determine. Evidence upon the subject of this speculative value, a value which in fact does not and cannot exist, should be confined to those facts which the court shall hold to be material for a fair and intelligent judgment and then the inferences to be deduced from them may be drawn just as well by the jury as by the expert, and in all probability much more fairly.

This case is one where the facts which form the basis of opinion can be specified and should be stated, and the inference to be drawn from those facts should be drawn by the court or by the jury.

A sufficient number of cases has been cited on both sides, I think, to place fairly before us the different reasons for the different views which would exclude or permit evidence of this nature to be laid before a jury. There can be no doubt, as I have already observed, that the great weight of authority both in the Supreme Court and in this court, is against the introduction of this evidence. And, indeed, there is no reason why it should be introduced. Expert evidence of the actual value of real estate is proper and in many cases essential. The present

value of the property of the plaintiff can be proved by expert evidence, both the value of the fee and the rental value. Both classes of value could also be proved by expert evidence, as of a time immediately prior to the building of this road. They are opinions based on facts which now exist or which once existed, and if the expert have knowledge of them, he should be permitted to state it. As to what the value would have been under circumstances which never existed, he knows and can know nothing, but must form an opinion wholly speculative in its nature, which opinion must be based upon data perfectly easy for him to state, and from which when once stated, an ordinarily intelligent jury can draw as just and fair an inference of a possible, yet conjectural value as could the expert. And that very inference must in some way be drawn by the jury, for it is the question it is called upon to decide. The opinion of the expert, if of the least value, would have to be based upon an intelligent consideration and knowledge of the value of other property as nearly as may be similarly situated, in about the same quarter of the town and under nearly the same circumstances, but without the presence of a railroad of the nature of the defendant's in front of the property. All this information he could easily impart to the jury.

Proof might be made of the filling up of the side streets along the lines of this railroad and of the incoming of a large population, the erection of buildings somewhat similar to plaintiff's, and their rental and fee value, and, finally, a general statement of the condition and value of property in the neighborhood of that in question could be proved. All these facts would be of service in determining the question to be submitted to the jury. When they are all stated and past and present values proved, the jury or the court will then be as fully competent to draw the inference which it is its peculiar province and duty to draw as the expert. This special question is one which all admit is to some extent and in all cases a matter of conjecture and speculation. How much the appreciation of property is itself due to the erection of the road and the consequent filling up of the neighborhood opened by it, and whether the property without the construction of the road would ever have become as

valuable as it is, are questions which, when these various data have been given, can be speculated upon as well by the judicial tribunal as by the hired expert. It is none the less conjecture and speculation because the expert is willing to swear to his opinion. He comes on the stand to swear in favor of the party calling him, and it may be said he always justifies by his works the faith that has been placed in him.

This case is a good illustration of what may be almost termed the wholly worthless character for any judicial purpose of the testimony on both sides upon this one point, as to what would be the value of this property if this railroad had not been built. The experts on the part of the plaintiff guessed that it would have been \$30,000 more valuable, while those on the part of the appellant, equally intelligent, it would seem, and equally honest, thought that the value of the property would have been less than at present if the railroad had not been built. The court is not in the least aided by the various guesses of these hired experts. If the facts upon which these gentlemen based their guesses are placed before the court, more exact justice will, in my judgment, be the result if their speculations be excluded, and all speculation as to the damage sustained by a plaintiff be confined to the court and drawn entirely from the evidence in the case.

It is urged, however, on the part of the plaintiff that even if this question were objectionable, yet the fault was cured by the questions put by the court, in response to which the witness said that the four houses fronting on Third avenue were worth \$80,000, and would have been worth \$110,000 if this structure and road were not there. If the objection were only to the form of the question, that which was made use of by the court would probably have cured the difficulty. But it is no objection to form that I have been discussing. The objection is to the substance of permitting the witness to state what in his opinion would have been the value of this property at this time, in case the railroad had not been built and operated. This objection was not cured by the alteration of the form of the question.

It is also claimed that there was sufficient evidence, excluding entirely the evidence of experts under the ruling of the court,

upon which the judgment may be sustained. There is some other evidence in the case, but what would have been the result if all this objectionable evidence were eliminated it is impossible for this court to determine. We went to the very extreme limit in upholding the judgment in the McGean case, but there the evidence was much more minute and the objectionable evidence seemed to have been objected to on the grounds other than its absolute incompetence. We thought it was doubtful whether the objection specifically and pointedly raised the question. The objection in this case is not only that it was incompetent, but the question was objected to on the ground that it was for the court alone, and not for the witness to determine the amount of damage. We think the objection was sufficiently exact to raise the question that has been discussed here.

GRAY, J., dissented, upon the following grounds, in substance: That the argument against this species of proof—as calling for the conclusions of the witness on a matter which the court or jury should alone determine, and hence invading the province—is inapplicable to cases of this character, where evidence as to the damage cannot always be furnished by exact data, nor in statements of facts, and where expressions of opinion seem so necessary to intelligent judgment. Nor is the evidence forbidden by established rules or principles; these principles are not embodied in rigid and lifeless formulas, which deny application to new conditions, but they admit of expansion and of frequent exception.

It is very plain that the value of plaintiff's easements, which defendants have taken, cannot be fixed by exact proof. The admissibility of opinions as proof of value and marketable condition of property constitutes a long settled exception to the rule excluding opinions. The ground of the exception is because the witness has been shown to have a knowledge of such matters, which jurors have not, and value is actually a mere matter of opinion. If admissible to prove value generally, why should such evidence be deemed inadmissible to prove value under different circumstances, *i. e.*, not only as the property is at present circumstanced, but what would be its value if circumstanced differently under ordinary conditions of street use?

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The fact, whether or not the value of the property might be greater to-day than it was before defendant's structure was built, if the street remained in its earlier condition, is a fact incapable of definite knowledge and, plainly, best ascertainable through the opinions of experts, qualified by familiarity with the neighborhood and by business habits.

The question is not like that of a trespass once committed, where the value before and after commission might sufficiently express the facts from which jurors could deduce conclusions as to damage. Here the aggravation of a continuing trespass and a deprivation of property rights must be considered in connection with possible benefits conferred; the result as to enhanced or diminished value, is best and more intelligently determined from competent opinions.

After reviewing the authorities, the judge concludes: "The witness' evidence does not conclude the court or jury, and it is still left to them to decide, with the aid of such skilled opinions, as to the measure and amount of damages which should be awarded by way of compensation. And if the witness is asked for his opinion as to the extent to which the plaintiff's estate has been damaged, it seems an over-refinement of argument to deny the propriety of allowing him to state the result of a mere subtraction of the values assigned to the premises with and without the structure. The judgment of the court, or of jurors, is not limited to the opinions given, but is formed from the consideration they may give to the evidence, and is simply aided by the information they may have derived from the skilled opinions in the case."

"Upon the grounds of superior convenience, of necessity and of an obvious propriety, and if we would have intelligent and just decisions of such issues, I think the evidence objected to is admissible in such cases."

All of the judges concurred with PECKHAM, J., except RUGER, Ch. J., and GRAY, J., who dissented.

Judgment reversed.

NOTE.—In an action for damages for negligence of defendant whereby injury resulted to the plaintiff, the depositions were offered in evidence, of several witnesses who testified that they were well acquainted with the

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nature and extent of the plaintiff's business, and expressed their opinions as to the damage which he must have sustained in consequence of his absence caused by the injuries in question.

The defendant's counsel objected to the introduction of the depositions in evidence on the ground, among others, that the testimony did not prove the fact—it was merely the opinion or conjectures of the witnesses, which ought not to be submitted to the jury, as they might have an improper influence on their minds in estimating the damages.

Held, that the depositions were improperly admitted; NELSON, Ch. J., saying, that the conjectures were not proper to be submitted to a jury, that the facts on which their opinions were founded, *e. g.*, the amount of business; the ability and attention of the plaintiff; the business season; the comparative inexperience of the partners; the money pressure in the market and the like, could be submitted to the jury and they were to give them such weight in estimating the damages as they should deem them entitled to.

Lincoln v. Saratoga R. R. Co., 23 Wend., 425.

NOTES OF RECENT CASES ON TESTIMONY AS TO
VALUE OF PERSONAL PROPERTY.

Alabama: Little v. Lischkoff, 1898, 12 Southern Rep., 429 (in an action upon an attachment bond, plaintiff may testify as to his opinion of the market value of the goods when attached). *Illinois*: Parmele v. Raymond, 43 Ill. App., 609 (every one is presumed to know the value of articles in common use, *e. g.*, toilet articles). *Michigan*: Richter v. Harper, 95 Mich., 221; s. c. 54 Northwest. Rep., 768 (it is error to allow a witness to testify as to the value of articles described to him, where the description is not stated to the jury); Erickson v. Drazkowski, 94 Mich., 551; s. c. 54 Northwest. Rep., 283 (in an action to recover the value of household goods, the plaintiff and her husband are presumed, as householders, to know their value, and may testify in reference thereto). *Missouri*: Bowne v. Hartford Fire Ins. Co., 46 Mo. App., 473 (a witness after he testifies that he knows the value of articles, may state their value; his means of knowledge is properly a subject for cross-examination). *Nebraska*: Omaha Auction, etc., Co. v. Rogers, 35 Neb., 61; s. c. 52 Northwest. Rep., 826 (a person having a general knowledge of household goods may testify in reference thereto, though he has not dealt in goods of that kind). *New York*: Moore v. Baylies, 32 N. Y. State Rep., 72; s. c. 10 N. Y. Supp., 62 (any person who knows the value of personal property is competent to give his opinion on the subject); S. P. Robinson v. Peru Plow & W. Co., Okla., 1893, 31 Pacific Rep., 988). *Texas*: Gulf, etc., R. Co. v. Vance, Tex., Civ. App., 21 Southwest. Rep., 303 (a railway passenger suing for a delay in the delivering of her trunk may testify as to the value of the use of her property during the delay).

NOTE.—In an action for damages done by defendant's cattle, in entering on the plaintiff's land and destroying his grass and apples, the following questions were put to witnesses and objected to as calling for opinions.

1. "To the best of your judgment, were there one hundred bushels of apples there?"
2. "What was the rowen worth?"
3. "What was the grass worth?"

Held, that the questions were properly admitted; LEARNED, P. J., saying as to the first question: "Unless a witness has actually made a count, an inquiry as to numbers is always a matter depending in a certain sense on his judgment, but it is admissible;" and as to the other questions: "It is always proper to ask a witness who is acquainted with the matter what is the value of an article. There is hardly any other way of proving value." Townsend v. Brundage, 6 N. Y. Supm. Ct. (T. & C.), 527.

In an action upon a promissory note made by the defendants, in which, as a counterclaim, the defendants set up a demand against the plaintiff for board, lodging and use of room, one of the defendants having testified that she had been a housekeeper for thirty years; that she performed the

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services necessary in furnishing such board, and that she herself rented the house where they lived when the plaintiff commenced boarding with them, and afterwards owned the house in which she boarded, was asked : "How much was the board and occupation of the room worth during the time plaintiff was there?"

This was objected to as incompetent, immaterial and improper, and also that the witness was not qualified to speak.

Held, that the question was properly admitted; that the witness was competent.

Hook v. Kenyon 55 Hun, 598.

McCullom v. Seward, 62 N. Y., 316.

McCOLLOM v. SEWARD.

New York Court of Appeals, 1875.

[Reported in 62 N. Y., 316.]

After a witness has heard plaintiff testify as to the character and time of his services, he may be asked: "What were his services as he (plaintiff) described them, worth per month?" for the question, in effect, is hypothetical, and leaves the jury to pass upon the credibility of the testimony upon which the opinion was based.

Action for services as laborer and foreman; the issue being on their value.

A witness for plaintiff who having testified he had heard plaintiff's testimony in his own behalf stating the details of what he did, then was asked: "What were his services, as he describes them, worth a month, taking the whole year round?"

Defendant's counsel objected on the ground that it was not competent for witness to give an opinion on plaintiff's statement.

The referee overruled the objection and defendant's counsel excepted.

Judgment was rendered for plaintiff on *Referee's* report.

The Supreme Court at General Term affirmed the judgment, being of opinion that the question was to all intents and purposes a hypothetical question.

The Court of Appeals affirmed the judgment.

ANDREWS, J. The question put to the witness Robinson, is not subject to the objection that it called upon him to determine the truth of facts deposed to by the plaintiff before giving an opinion as to the value of his services. If the question was subject to the construction put upon it by the counsel for the defendant the objection was well founded. It was for the jury to determine the credit to be given to the plaintiff's testimony, and the opinion of Robinson as to the value of the services founded upon the plaintiff's evidence could only be given

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hypothetically, that is, assuming that the facts stated by him were true, which it was for the jury to decide. And this we think was implied in the question put. The question was: "What were his services, as he (plaintiff) described them, worth a month, taking the whole year round?" This was equivalent to asking him "Assuming that the services rendered were as described by the plaintiff what were they worth?" It left the jury to pass upon the credibility of the testimony upon which the opinion was based. The allowance of interest on the plaintiff's claim from the time of the commencement of the suit although the amount was then unliquidated, was proper within the recent authorities upon the subject. (*Feeter v. Heath*, 11 Wend., 478; *Van Rensselaer v. Jewett*, 2 N. Y., 135; *Adams v. Fort Plain Bank*, 36 *id.*, 255; *Mygatt v. Wilcox*, 45 *id.*, 306; *McCormick v. The Penn. Central R. R. Co.*, 49 *id.*, 304.)

The judgment should be affirmed.

All concur.

Judgment affirmed.

In *Head v. Hargrave*, 105 U. S., 45, an action for legal services, it was held that the opinions of attorneys as to their value, were not to preclude the jury from exercising their "own knowledge or ideas" upon the value of such services; that this was a principle applicable to opinions as to the value of labor in other departments, and as to the value of property, it being the jury's province to determine the weight due the opinions expressed.

In *Johnson v. Myers*, 103 N. Y., 663, an action for services, a witness having been shown to have had abundant opportunity to know, was asked what proportion of Johnson's time was devoted to Myers' business.

This was objected to on the ground that the witness was incompetent to give an opinion. The objection was overruled and an exception taken. The witness answered, "One-half from 1864, to the time of Johnson's death." *Held*, that the question was proper as calling for a fact within the witness' knowledge and not for an opinion.

NOTES OF OTHER CASES ON TESTIMONY AS TO VALUE OF SERVICES.

Chicago, etc., R. Co. v. Roberts, 35 Ill. App., 137 (in an action for killing a married woman her husband cannot testify as the value of her services to himself and family). Chicago, etc., R. Co. v. Bivans, 142 Ill., 401; s. c. 32 Northeast. Rep., 456 (in an action for personal injuries plaintiff may give his opinion as to the value of his services per day during the time he was disabled).

Loy v. Petty, Ind. App., 1892, 29 Northeast. Rep., 788 (in an action by a minor for services on a farm, farmers who had seen the plaintiff work may testify as to the value of his services).

Turner v. Keller, 66 N. Y., 66.

TURNER v. KELLER.

New York Court of Appeals, April, 1876.

[Reported in 66 N. Y., 66.]

Where evidence had been introduced tending to show that Elliott, under whom plaintiff derived title to the note sued on, had procured George Reges to sign Henry Reges' name to the note, knowing that he had no authority, the question to Elliott, as a witness, whether he supposed at the time of the signing that George had such authority,—*Held*, competent in rebuttal of any inference of knowledge, but not competent upon the question of authority.

That Elliott, in subsequent similar transactions with George, had given credit to Henry, therefore also, *held*, competent.

Plaintiff sued on notes purporting to have been made by Henry Reges and endorsed by defendant.

The defense was that one Elliott, to whom defendant endorsed the note produced and from whom plaintiff derived it after maturity, requested and procured George, the brother of Henry, to sign the note in the name of Henry and without authority, and that Elliott induced defendant to indorse the note by fraudulently representing that the signature was Henry's.

Plaintiff claimed that George, the brother of Henry, having failed in business, Henry bought the establishment and authorized George to do business in his name and make notes thereon, and told Elliott of the fact, and that he would be responsible for cattle sold to George.

Upon the report of the *Referee*, judgment was entered for plaintiff.

The Supreme Court at General Term affirmed the judgment.

The Court of Appeals affirmed the judgment.

CHURCH, Ch. J. [*after stating the facts*]: The exception to the decision overruling the objection to the question to Elliott, whether he supposed and believed, at the time George signed Henry's name to the notes, that George had authority to thus sign them, is not tenable. The defendants had before put in evidence tending to prove that Elliott requested Henry to sign the notes, knowing that he had no authority. The

Richmondville Union Seminary v. McDonald, 34 N. Y., 379.

fact of authority was sought to be proved by circumstances which were not conclusive and might be true, and yet Elliott might know that no authority existed. To rebut such an inference it was competent to ask what the fact of his belief was at the time. It was not competent upon the question of authority, but if it was competent for any purpose it was sufficient. 56 New York, 618 is not applicable.

The fact that Elliott gave credit to Henry for cattle, after the conversation, was also competent; it showed that he acted upon the authority Henry had given him, and tended to corroborate the fact of such authority.

RICHMONDVILLE UNION SEMINARY v. McDONALD.

New York Court of Appeals, 1866.

[Reported in 34 N. Y., 379.]

In an action by a corporation upon a subscription paper, an officer of the corporation, examined as a witness and having knowledge upon the matter, may state that debts were contracted by the corporation on the faith of the subscription.

This is rather matter of fact than opinion.

Plaintiff sued defendant as a subscriber to eight shares of its capital stock, which defendant agreed to pay for at such times as the trustees should require.

Upon faith of the subscription, the plaintiff, by its trustees erected buildings and incurred liabilities.

The trustees passed a resolution requiring payment of the subscription, of which defendant had notice, and was requested to pay, but neglected and refused so to do.

One of the trustees of the plaintiff corporation called by the plaintiff was asked on its behalf: "Were the debts contracted by the trustees and officers of plaintiff, on the faith of and relying upon the subscription made?"

The defendant's counsel objected: 1. The evidence offered is irrelevant; 2. It calls for a conclusion of the witness, and not a fact."

The referee overruled the objection, and exception was taken.

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The witness answered, "They were."

Upon report of the *Referee*, judgment was entered for the plaintiff.

The Supreme Court at General Term affirmed the judgment without discussing this point.

The Court of Appeals affirmed the judgment.

SMITH, J., [*on this point*]: It is now insisted that the referee erred in permitting the witness to testify that there were debts contracted by the trustees and officers of the plaintiff on the faith of and relying upon the subscription. Of these two objections to the question taken at the trial, the only one now urged is, that it called for a conclusion of the witness, and not a fact. If it be assumed that the witness had such an acquaintance with the acts of those who contracted debts as the agents of the plaintiff, as to enable him to speak to the subject, the overruling of the objection was not erroneous. The question called for a fact, and not for an opinion. If the opposite party wanted the witness to state the matter more in detail, he could have cross-examined him for that purpose. (33 Barb., 229, 235, 236.)

It is not now objected that the question was leading. It was not objected at the time that the witness was not shown to have such an acquaintance with the subject matter as to make him competent to answer the question. If that object had been taken, it is to be presumed it could have been obviated. Indeed, it was proved that the witness was the vice-president and one of the trustees of the corporation, and it may be presumed that, if the objection last suggested had been taken, the plaintiff could have shown that the witness had sole personal charge of the construction of the building, and the contracting of debts therefor, under the authority of the board of trustees, and thus that the question related to a matter which was within his personal knowledge. A party objecting to evidence should state specifically the precise ground of his objection (20 Johns., 357; 5 Barb., 398), and in such plain and unequivocal terms as to leave no room for debate about what was intended. *Daniels v. Paterson*, 3 N. Y., 47, 51. The objection stated was properly overruled.

Ely v. Padden, 13 N. Y. St. Rep., 53.

ELY v. PADDEN.

New York Supreme Court, 1887.

[Reported in 13 N. Y. State Rep., 53.]

The principle that in actions to rescind contracts for fraud, etc., plaintiff may testify that he believed the alleged fraudulent representations of defendant,—*applied* in an action to recover money paid by mistake on a purchase of real estate, though no fraud was alleged: and *held*, not error to allow plaintiff's agent to testify that he believed defendant's statement as to quantity.

Plaintiff sued to recover back a sum of money overpaid by her, by mistake, upon the purchase of defendant's farm.

The deed of the farm described three pieces of land, of fifty, eighty and eleven acres, respectively, making in all 141 acres, while, in fact, the eleven acre piece was a part of the eighty acres, so that only 130 acres were conveyed.

It appeared in evidence that both the defendant and Pierce, her son-in-law, who acted for her in the transaction, said to Cooper, agent of the plaintiff, that the defendant's farm contained 141 acres. In that respect, they acted under a mutual mistake.

The plaintiff's counsel asked the witness Cooper "From what the defendant has stated to you, did you believe there were 141 acres in the land that was conveyed to the plaintiff?"

Objected to on the ground that "it is improper for the witness to give his belief in an action founded on contract; no fraud is alleged and none claimed."

Objection overruled and exception taken. The witness answered "I did."

Upon the report of the *Referee*, judgment was entered for the plaintiff.

The Supreme Court at General Term affirmed the judgment.

SMITH, P. J. It is contended that this was error. If the action had been to rescind the contract for fraud, or in affirmance of it, to recover damages for the fraud, there is abundant authority for saying that it would have been competent for the plaintiff to

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testify that he believed the alleged fraudulent representations of the defendant, and was induced by them to enter into the contract. We think it was also competent, in this action, to show that the plaintiff, or her agent, relied upon the representations of the defendant, which, although not fraudulent, were untrue. In either case, the fact to be proved is, that the action of the plaintiff was induced by the statements of the other party, and if the testimony objected to is competent in one case, it seems to be equally so in the other. The case cited by the appellant's counsel (*Betjmann v. Brooks*, 39 Hun, 649, and the cases there cited) do not sustain his position.

Equally unobjectionable was the question addressed to the plaintiff: "How many acres did you suppose you were getting in return?" It was competent upon the issue as to her mistake.

SWEET v. TUTTLE.

New York Court of Appeals, 1856.

[Reported in 14 N. Y., 465.]

On an issue as to whether defendant employed the plaintiff or whether several persons acting jointly were the real employers, it is competent on direct examination to ask one of the alleged joint contractors, called as a witness: "On the part and behalf and for whom did the defendant do what he did?" for this calls for a fact rather than an opinion.

Bensley G. Sweet sued Jonathan W. Tuttle for services in saving the wreck of the propeller *Phoenix* on the lakes, in the fall of 1847.

The answer set up and the contention on the trial was, that the services, etc., had been performed not for the defendant but for and at the request of several persons jointly, who were the owners of the *Delaware* and of whom defendant was one; and that they all ought to have been joined.

One of the persons named as joint promissors with defendant, was called as a witness for defendant; and after testifying that he was at the time in question, one of the owners of the *Delaware*, naming them, he was asked: "On the part and behalf,

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and for whom did Tuttle [the defendant], do what he did, that fall, in relation to the wreck of the Phoenix?"

Plaintiff's counsel objected that it does not appear what he did, and second, it asks for the legal effect of what he did.

Objection overruled and exception taken.

Ans. "For the owners of the Delaware that I have named."

The Referee's report was for defendant and judgment for defendant was entered thereon.

The Supreme Court at General Term affirmed the judgment without opinion.

The Court of Appeals affirmed the judgment.

COMSTOCK, J. [*on this point*]: The question did not call for an opinion, and therefore was not open to objection on that ground. The fact which it called may have been a conclusion deducible from other special facts, but this could not well appear until the question was answered and the examination then pushed somewhat further. After the inquiry was answered the plaintiff had a right, if he pleased, to cross-examine, and it might thus have appeared that the fact stated by the witness was a mere deduction of his own mind from the special circumstances of the transaction. But this course was not taken; and on the face of the question I think the answer called for belonged to a class of facts to which a witness may be allowed to speak directly.

HUBBARD, J. [*dissenting on another point, said as to the question in controversy*]: It is a general rule that witnesses must be confined to the communication of facts, and not opinions or conclusions drawn by them from facts, whether such facts are known to them or derived from the testimony of others. (*Morehouse v. Matthews*, 2 N. Y., 514.) But the question in this case does not conflict with this rule. It called not for an opinion or conclusion, but for a primary fact presumed to be within the knowledge of the witness, the same as an inquiry as to who compose the members of a co-partnership. It is a common practice on trails to prove the fact of hiring or an employment by a direct question; the means or grounds of knowledge, as it respects credibility, are left to be tested by cross-examination.

Betjmann v. Brooks, 39 Hun, 649.

BETJMANN v. BROOKS.

New York Supreme Court, 1886.

[Reported in 39 Hun, 649.]

In an action to recover from defendant for goods sold to her through an alleged agent, it is error to allow the plaintiff to testify to what person he mentally gave credit for the goods at the time of the sale.

Plaintiff sued for goods sold. The chief issue was, to whom the plaintiff charged the goods—upon whose credit they were sold—and this was a legal conclusion to be drawn from all the facts and circumstances disclosed. The plaintiff had admitted, while under examination, that he did not know the defendant personally and had never seen her, and that he did not know her son William L. Brooks personally, and had not received any orders from him personally for groceries; and therefore, as suggested, the establishment of the defendant's responsibility depended upon facts and circumstances. After the defendant rested, the plaintiff was recalled and asked under proper objection and exception, the following question: "In delivering the goods which were delivered during the administration of Mrs. Clapp, did you give the credit to Mrs. Clapp personally or to Mrs. Brooks?" to which the plaintiff answered, "On paper?" And then followed the question: "Not on paper but in your mind?" to which the plaintiff responded, "Mrs. Brooks." And this question was repeated as to the goods furnished the other alleged agents, and allowed under objection and exception.

Upon the report of a *Referee*, judgment was entered for plaintiff.

The Supreme Court at General Term reversed the judgment.

BRADY, J. [*after stating facts*]: This was an error. It has been so declared by two cases in the court of last resort. (*Nichols v. The Kingdom Iron Ore Co. of Lake Champlain*, 56 N. Y., 618; *Merritt v. Briggs*, 57 *id.*, 651.)

In the former case the question was whether machinery alleged to have been sold to the defendant was purchased by him or one

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Colt. The witness who set up the machinery was asked, "For whom did you set up that machinery, as you supposed?" That was objected to and answered, but was held to be error.

The plaintiff was a witness on his own behalf in that case and was asked whether he asked Colt for the payment of the bill as his debtor. This was objected to as calling for a construction of what was said and not the language, and an answer having been allowed, it was held to be error.

In the latter case the defendant gave evidence tending to show that he purchased the cattle alleged to have been bought by him as a broker for one Hall and upon his credit, the plaintiff knowing his agency. He was a witness on his own behalf and asked this question: "State on whose credit the cattle were bought?" It was held that the question was incompetent, for it called for the defendant's conclusion or opinion, but that the objection taken was insufficient to make the exception available.*

NOTE.—In *Sloan v. New York Central Railroad Co.*, 45 N. Y., 125, an action for damages for injuries received through the negligence of the defendant in running cars on a road which was not in a safe and proper condition (the car in which plaintiff sat being thrown down an embankment, and incurable injuries resulting); the female attendant of the plaintiff was asked on the trial: "How far did the plaintiff help herself, and at what point did she require your assistance to do what was necessary to be done?" *Held*, proper. CHURCH, Ch. J., said, it called for facts and not mere opinions.

In *Murray v. Deyo*, 10 Hun, 3, an action by plaintiffs as trustees of a second mortgage made by the Walkill Valley Ry. Co., the trustees having, on a default of the railway company in payment of interest, taken possession of the railroad, claiming to recover certain moneys collected by the defendant from the United States Government for postal service on the railroad under a contract between that company and the government—where a question involved was as to whether the plaintiffs had taken possession of the road in May, 1873, a witness whom plaintiffs had employed in June, 1873, as superintendent on this road, was asked: "For whom and on whose behalf did Mr. Burdell make that employment, if you understood?" This was admitted, under defendant's exception. *Held*, not error, BARNARD, P. J., saying: "I think the question here proposed rather comes under the case of *Sweet v. Tuttle* (14 N. Y., 465). There the question was: 'On the part and behalf and for whom were the services rendered?' This was held not necessarily to call for an opinion.

* No ground for the objection was stated.

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The question in this case does not. A single question further would have rendered it certain whether he related what was said, or only a deduction from what was said. In *Nichols v. Kingdom Iron Ore Co.* (56 N. Y., 618), the question is entirely different; 'For whom did you set up the machinery, as you supposed?' This question manifestly called for an opinion of the witness instead of for a fact."

In *De Cordova v. Powter*, 16 N. Y. State Rep., 1006, an action to recover moneys advanced to the defendants, and for commissions upon merchandise sold by the plaintiff, where a question was raised whether plaintiff had given the credit to defendants as partners, the plaintiff as a witness was asked what, if anything, induced him to give credit to the Phosphate Company, or to the defendants as a partnership. This was objected to as incompetent and immaterial, but the objection was overruled and the appellants excepted, and the answer was that he supposed they were perfectly solid, and that he meant Mr. Powter and Mrs. Habich. Then he was asked whether he supposed they were in partnership, that they were both principals, and the same objections were made to this question. The court allowed it to be answered, and the defendant excepted, and the witness answered "Undoubtedly." The Supreme Court at General Term, held it not error, DANIELS, J., saying: "The questions were inartistic in form, but it is quite evident that the design with which they were asked was no more than to ascertain the belief of the witness, or a statement of what he may have relied upon in the dealings. And the answer which was made was an indication of the fact that he did believe the defendants were partners. It was not very important that this answer should have been obtained from him, for it is evident from the other testimony given in the action, and the form in which it was commenced, that this belief existed in the mind of the plaintiff. And where that is a circumstance in the case the witness may be interrogated as to the state of his mind in this respect."

In *Kellar v. Richardson*, 5 Hun, 352, *held*, that the question "To whom did you look for performance of the contract?" called merely for thoughts and not acts, and was not competent.

Where the issue was with whom plaintiff made his contract, he was asked as a witness: "Is Donal Campbell a man of responsibility?" The plaintiff answered: "So far as I know, he was not responsible."

Held, that the admission of such evidence was error.

Denman v. Campbell, 7 Hun, 88.

On a question as to a man's solvency at a certain time, a witness who had been acquainted with the man's pecuniary circumstances for several years, and who subsequently stated numerous facts touching the man's property and indebtedness, was asked: "Was he able to pay his debts, in December, 1855, in the usual course of trade?" This was objected to as calling for an opinion.

Held, that it did not call for the opinion of the witness simply; that in form it called for a fact, whether James was able to pay his debts in the usual course of trade.

Thompson v. Hall, 45 Barb., 214.

Betjmann v. Brooks, 39 Hun, 649.

On trial of an indictment for obtaining moneys by false pretenses as to his business connections and as to the pecuniary standing of one Chamberlain an alleged partner, a witness who testified that he was conversant with Chamberlain's business and knew of his real and personal estate and of his bank stock and of his debts from 1877 up to June, 1878, was asked what in his opinion was the financial standing of Calvin T. Chamberlain from October 1877, to February, 1878.

This was objected to, among other reasons, on the ground that his opinion was not evidence.

Held, error to receive the witness' opinion.

York v. People, 31 Hun, 446.

Where the question was whether an assignment of property to plaintiff had been bona fide and was held by her, independent of her insolvent husband, she was asked as a witness in her own behalf: "For whom did your husband do what business he did after you took the deed?" etc. This was objected to as calling for a legal conclusion.

Held, competent. "Legal considerations may no doubt be involved in a question of agency. But *prima facie* the inquiry whether a person engaged in a particular employment was doing business on his own behalf or as the agent of another, involves only the question of fact whether he had been employed by that other person, and it is therefore a competent question."

Knapp v. Smith, 27 N. Y., 277.

NOTES OF RECENT CASES AS TO TESTIMONY TO ESTABLISH A CONTRACT, AGENCY, PARTNERSHIP, ETC.

Alabama: Jacksonville, etc., *R. Co. v. Woodworth*, 1891, 8 Southern Rep., 177 (a witness cannot give his opinion as to whether or not a contract has been abandoned; the facts must be proved). *Clark v. Ryan*, 1892, 11 *id.*, 22 (it is error to permit plaintiff to testify that he was discharged without any fault on his part and that up to the time of his discharge he had performed his part of the contract in full). *Alexander v. Handley*, *id.*, 390 (in an action to charge defendant as a partner where the business agreement between defendant and his associates has been given in evidence it is incompetent for one of the associates to testify that they were partners). *California*: *Kreuzberger v. Wingfield*, 96 Cal., 251; s. c. 31 Pacific Rep., 109 (where plaintiff has testified as to the work he did and the materials he has furnished, it is not improper to ask him whether he completed the work according to contract). *Colorado*: *Moffatt v. Corning*, 14 Colo., 104; s. c. 24 Pacific Rep., 7 (a witness' opinion as to what was the consideration for a contract is inadmissible). *Georgia*: *McCaulla v. Murphy*, 84 Ga., 475; s. c. 12 Southeast. Rep., 655 (a witness cannot testify as to a mere conclusion of law from facts stated in the question). *Illinois*: *Druley v. Johnson*, 21 Ill. App., 267 (one of the makers of a note cannot testify as to whether he signed as principal or surety). *Wiley v. Stewart*, 23 *id.*, 236; *affd.* in 122 Ill., 545 (a witness cannot testify that one partner did not give to another authority to do an act which is alleged to have been within the scope of the firm's business). *Indiana*: *McCormick v. Smith*, 127 Ind., 230; s. c. 26 Northeast. Rep., 825 (a grantor's testimony that grantee was to pay full value by cancelling certain debts, is not a mere statement of a conclusion of fact where all the circumstances are stated). *Iowa*: *Haller v. Parrott*, 82 Iowa., 42; s. c. 47 Northwest. Rep., 996 (a mortgagor of cattle may testify upon what cattle the mortgage was given to identify them). *Jamison v. Weaver*, 81 Iowa, 212; s. c. 46 Northwest. Rep., 996 (testimony of one sued for services under an alleged special contract as to whether the services were rendered under the contract or not, is a statement of fact). *Sax v. Davis*, 81 Iowa, 692; s. c. 47 Northwest. Rep., 990 (one sued for goods may testify that he never purchased, nor authorized the purchase of, any goods from the seller). *Eggleston v. Mason*, 1893, 51 *id.*, 1 (a witness who has merely observed the manner in which a firm has conducted business cannot testify that a person was a member of the firm). *Gault v. Sickles*, 52 *id.*, 206, (a member may testify that the husband of a claimant against a decedent's estate managed his wife's business when she did not). *Kansas*: *Cogshall v. Pittsburgh Roller Milling Co.*, 48 Kan., 480; s. c. 29 Pacific Rep., 591 (in an action for breach of a contract it is not error to refuse to allow defendant to ask a witness, who is also a defendant, whether he ever accepted a certain proposition). *Kentucky*: *Thomp-*

son *v.* Brannin, 1893, 21 Southwest. Rep., 1057 (a witness cannot give his opinion as to the legal effect of a transaction between the parties as to a sale of goods). *Minnesota*: Larson *v.* Lombard Invest. Co., 1893, 53 Northwest. Rep., 179 (though a witness cannot give his opinion as to one's agency it is not prejudicial error to have admitted such evidence where it does not effect the result). *Nebraska*: Burkholder *v.* Fonner, 34 Neb. 1; s. c. 51 Northwest. Rep., 293 (in an action to recover commissions for selling real estate, the purchaser, after testifying in detail as to the transaction and from whom he received information concerning the property, it is not error not to permit the witness to state from whom he made the purchase). *New York*: Stone *v.* Assip, 18 N. Y. Supp., 441; s. c. 45 State Rep., 271; testimony as to the effect of a contract is incompetent); s. p. Voisin *v.* Commercial Mut. Ins. Co., 62 Hun, 4; s. c. 16 N. Y. Supp., 410. Sentenne *v.* Kelly, 59 Hun, 512; s. c. 37 State Rep., 162; 13 N. Y. Supp., 529; s. c. 37 State Rep., 162 (a witness cannot testify as to what would be a reasonable time for the doing of an act required by contract to be done). Fisher *v.* Monroe, 17 N. Y. Supp., 837; s. c. 42 State Rep., 118 (in an action for a breach of a contract of employment, plaintiff cannot be asked whether she has performed all her duties). Ellison *v.* Jones, 15, N. Y. Supp., 356 (in an action for services plaintiff may testify that he did a full man's work). Holler *v.* Apa, 17 *id.*, 504; 43 State Rep., 529 (a question whether work had been done under an alleged agreement held properly excluded). Allen *v.* Rogers, 23 N. Y. Supp., 1071, (in an action to recover money upon a contract which defendant denied, defendant as a witness cannot be asked, "Did you know at any of the time that A. (the plaintiff) was working for you?") Johnson *v.* Crotty, 22 *id.*, 753; s. c. 3 Misc., 270 (in an action for services plaintiff cannot be asked on cross-examination whether he relies upon a direct agreement with defendant). Duryea *v.* Vosburgh, 17 *id.*, 742; s. c. 45 State Rep., 17 (in an action to recover from defendant an alleged overcharge which plaintiffs had paid defendant for the purchase of an interest in a partnership which defendant had negotiated, defendant may testify whether he acted for plaintiffs or for the partnership). Reynolds *v.* Lawton, 62 Hun, 596; s. c. 17 N. Y. Supp., 432, (in an action on an alleged partnership debt, defendant cannot testify that he did not hold himself out as a partner). *Pennsylvania*: New England Monument Co. *v.* Johnson, 144 Pa. St., 61; s. c. 22 Atlantic Rep., 974 (a witness present at negotiations cannot testify that a contract was made). *Texas*: Doggett *v.* Wallace, 75 Tex., 352; s. c. 13 Southwest. Rep., 49 (in an action for breach of promise plaintiff may testify that she became engaged to defendant).

Lawyer v. Loomis, 3 Sup. Ct., (T. & C.), 393.

LAWYER v. LOOMIS.

New York Supreme Court, 1874.

[Reported in 3 N. Y. Sup. Ct., (T. & C.), 393.]

Where the facts proved are equivalent to an illegal intent,—*e. g.*, where, in malicious prosecution, want of probable cause is proved,—the party cannot, on testifying in his own behalf, be asked as to his intent.

An action for malicious prosecution, in which defendant had caused the arrest of plaintiff for taking his buggy, after plaintiff had learned that another person took it.

Defendant's counsel proposed to ask the defendant whether in procuring the warrant he acted without malice.

The question was objected to by plaintiff's counsel, and excluded, and defendant's counsel excepted.

The Circuit Court entered judgment for plaintiff.

The New York Supreme Court affirmed the judgment.

MULLIN, P. J. [*on this question*]: It was for the jury to say whether the defendant acted maliciously, and to allow the question would be substituting the witness in place of the jury to determine one of the most important questions in the cause. When the intent with which an act is done forms an essential element of it, the actor may, as a general rule, be asked whether he did the act with such intent. Doing an act maliciously is equivalent to doing it with a malicious intent. If this is a case in which the defendant was entitled to deny the intent, the evidence offered should have been received.

Proof of malice, however intense it may be, will not dispense with proof of the absence of probable cause. But malice may be inferred from the absence of probable cause. When, therefore, the jury find the absence of probable cause, malice or a malicious intent is established; proof of want of malice is, therefore, immaterial in a case where want of probable cause is found. There

Lawyer *v.* Loomis, 3 Sup. Ct. (T. & C.), 393.

cannot be a total absence of malice in a case in which want of probable cause is established. It is not necessary to consider whether the evidence of the absence of malice would be admissible when the plaintiff gave evidence tending to prove express malice. Malice can only be rebutted by facts which show, or tend to show, probable cause.

In *Fiedler v. Darrin*, 50 N. Y., 437, the defendant resisted a recovery in ejectment, on the ground that the deed under which plaintiff claimed was a mortgage, and that it was void for usury. On the trial the plaintiff's counsel offered to ask the plaintiff whether he intended to take usury. I infer from the case that the evidence was excluded on the trial, and the Court of Appeals held that it was excluded properly. Taking more than seven per cent. constituted usury, and the law inferred the intent from the terms of the contract, and an intent not to violate the statute could not be otherwise proved. I cannot discover any distinction in principle between that case and this. Malice is inferred from want of probable cause, the want of probable cause must be established by the facts surrounding the transaction. A case of want of probable cause, without malice, would be *felo de se*. The thing is impossible.

The judgment must be affirmed.

Judgment affirmed.

NOTE: In *Waugh v. Tiedling*, 48 N. Y., 681, an action to recover a balance alleged to be due upon the sale of an engine and boiler; defense, fraud in the sale. Upon the trial, after the defendants had given evidence as to plaintiff's representations and the defects in the property purchased, plaintiff offered himself as a witness, and was asked by his counsel, and allowed to answer the question: "Did you give, or intend to give, the defendants anything more than your opinion in regard to its condition?" *Held*, error. The cases of *Seymour v. Wilson* (14 N. Y., 567), and *Cortland v. Herkimer* (44 N. Y., 22), distinguished.

Yerkes v. Salomon, 11 Hun, 471.

YERKES v. SALOMON.

New York Supreme Court, 1877.

[Reported in 11 Hun, 471.]

Although a contract for the sale and delivery of stock at a future day is not void because the vendor does not possess the stock, yet if neither party intended its delivery, but merely to pay the difference, according to the different rate of the market, the contract is void as a wager contract. It is therefore proper to ask one of the parties his intent as to delivery.

Plaintiff sued on contracts for the sale of stocks at a future day, commonly called puts and calls.

The defense was that the contracts were wagers, it being claimed that it was the intention of the parties to settle the difference, as they subsequently did, and not to deliver or accept the stock; and the defense relied on the Statute, which is as follows: [1 R. S., p. 662, § 8] [3 *id.*, 8th ed., p 2218, § 8.] "All wagers, bets or stakes, made to depend upon any race, or upon any gaming by lot or chance, or upon any lot, chance, casualty or unknown or contingent event whatever, shall be unlawful. All contracts for or on account of any money or property, or thing in action so wagered, bet or staked, shall be void."

The plaintiff having been examined on his own behalf, was, on cross-examination, asked: "Was it your intention at the time these contracts, or either of them, were made, to tender or call for the stock, or merely to settle upon the difference?"

Objected to and excluded and defendant excepted.

The Circuit Court entered judgment for plaintiff.

The Supreme Court at General Term reversed the judgment.

BRADY, J. [*after stating facts*]: The form of the contract does not decide the question, because it would not be difficult to make the contract relating to the bet apparently lawful, while the intent with which it was entered into was to avoid or evade the statute. It is not the form in which the trick or device is presented, but the intent with which it is planned. When the question was asked, therefore, as to the intent, the subject was

opened and the inquiry was pertinent. The authorities are abundant upon the proposition that if neither party intended to deliver or accept the shares, but merely to pay differences according to rise or fall of the market, the contract is for gaming. (*Grizewood v. Blaine*, 73 Eng. Com. Law, 525; *Brua's Appeal*, 55 Penn., 298; *Cooke v. Davis*, 53 N. Y., 318; *Cameron v. Durkheim*, 55 *id.*, 425; *Peabody v. Speyers*, 56 *id.*, 230; *Bigelow v. Benedict*, 9 Hun, 429; *Storey v. Salomon*, Com. Pleas, 6 Daly, 531 [affd. in 71 N. Y., 420].) The intent of the plaintiffs was one step in the defense, and when the attempt to prove it was rejected, the defendant secured the advantage of an exception. In *Cassard v. Hinman*, (6 Bosw., 14) the question asked was, "at the time of the making the writings between you and Cassan, was anything said by Nathan (the broker) as to the performance by receipt and delivery of pork, or the settlement by payment and receipt of differences, and if so, what?" The question was excluded, and it was held to have been erroneously ruled upon. The inquiry was held relevant to the defense, which was substantially that the contract was a wager. The ruling considered demands, therefore, that a new trial be granted.

Ordered accordingly, with costs to abide the event.

DAVIS, P. J., and DANIELS, J., concurred.

Judgment reversed, new trial ordered, costs to abide event.

DILLON v. ANDERSON.

New York Court of Appeals, 1870.

[Reported in 43 N. Y., 231.]

The intent of a party, unexpressed, in making a contract, is not admissible in evidence to show what the contract was. It is only when the act is admitted, and its validity turns on the intent, that the witness may be asked his intent.

Plaintiff sued to recover damages for breach of contract. One defense was, that one John L. Hasbrouck was a joint contractor with the defendant.

On the trial it appeared that the contract was signed and

Dillon v. Anderson, 43 N. Y., 231.

delivery exchanged between plaintiff and the defendant alone; but Hasbrouck's name appeared in the instrument as a party.

The defendant being a witness in his own behalf, was asked by his counsel: "Did you intend to make an individual contract?"

The question was excluded by the court.

The Ulster Circuit entered judgment for plaintiff.

The Supreme Court at General Term affirmed the judgment.

HOGEBROOM, J. [*passing upon this point*]: I think the question "Did you intend to make an individual contract," was properly overruled, for if he had answered in the affirmative, its exclusion would have been prejudicial to defendant; if in the negative, it would not have been decisive of non-liability of the defendant, except as joint contractor with Hasbrouck.

Contemporaneous acts and declarations drawn out by the adversary, would of course be admissible evidence of a party's intent; but declarations of a party as to his intent at any other time, called for by himself, would not be admissible, and admitting evidence of such intent, which had never been expressed in words, but kept confined within the party's own breast, and not brought forth till the actual trial of the cause had exposed the party to all the temptations of fraud and perjury, would seem to be still more objectionable.

The Court of Appeals reversed the judgment.

FOLGER, J. [*on the point in question*]: It called for his purpose mentally formed, but undisclosed to the plaintiff. It sought to annul, by an intention not expressed, words and acts relied upon by the plaintiff, by which he was influenced, and which of themselves were *prima facie* evidence of an agreement. An agreement is said to be the meeting of minds of the parties. But minds cannot meet when one keeps to itself what it means to do, nor can one party know that the other does not assent to a contract, the terms of which have been discussed and settled between them, unless dissent is made known. Here was the oral bargaining going before the written contract. Here was the written contract signed and delivered

without qualification of the act of delivery, without the expression of the intention called for by the question that the act of delivery was not to be taken as meaning all it seemed to mean. The testimony called for was not proper. There are authorities that a witness may be asked his motive or intent in doing an act. (See *McKown v. Hunter*, 30 N. Y., 625; *Thurston v. Cornell*, 38 *id.*, 281; *Bedell v. Chase*, 34 *id.*, 386.) We think that they hold no more than this: That where the doing of the act is not disputed, but is affirmed, and whether the act shall be held valid or invalid, hangs upon the intent with which it was done, which intent from its nature would be formed and held without avowal; there he upon whom the intent is charged may testify whether he secretly held such intent when he did the act. Thus an insolvent assignor in trust, charged with the fraudulent intent to hinder and delay creditors, may be called in support of the deed of trust, and may say whether, when he made it, he had no fraudulent purpose. And one sued for a malicious prosecution, may testify that in setting on foot the legal proceedings, he believed that there was cause for them. And, as an extreme case, which we are not willing to extend, one, against whom the defence of usury has been set up, has been permitted to testify what was the intention in stipulating for a sum reserved out of the face of a note. But that an act should be held to have or not to have effect, and one party to it, to be bound or not as the other party to it should, by his undisclosed purpose, have determined, is warranted by no sound principle. [*Ruling on other points omitted.*]

PEOPLE v. BAKER.

New York Court of Appeals, 1884.

[Reported in 96 N. Y., 340.]

On an indictment for obtaining a specified sum by false pretences, the prosecution having given evidence of other sums obtained before and afterward from the same person, in the same course of conduct,—*Held*, error to refuse to allow defendant, as a witness in his own behalf, to answer the question whether it was his intention, when he received such moneys from time to time, to defraud. For the case

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went to the jury in such a way that the receipt of all the moneys had a tendency to show the intent.

Held, also, error to refuse to allow defendant to state what was his intention, it being the theory of the defense that his intention was to replace the security which he had converted, but had reported to be still retained.

Trial of indictment for obtaining money by false pretences.

One Meeker, having bought some stock on margin, through the defendant, sent him money at different times to pay for the stock.

Defendant, pressed by financial necessity, sold the stock without the knowledge or consent of Meeker, who kept sending him money, which defendant acknowledged; and defendant continued to send statements showing credits for money and dividends as if the stock was still actually held by him.

On the trial the People were permitted, against objection, to show payments of money by Meeker to defendant from time to time, before and after the payment of a sum of \$575, the only sum the indictment charged him with obtaining.

Evidence of such other payments was given for the purpose of showing his guilty intention.

The defendant, as a witness in his own behalf, was asked: "Was your intention, when you received moneys from time to time from Meeker, to defraud him?"

Objected to as incompetent and inadmissible. The objection was sustained and exception taken.

At the Court of General Sessions defendant was convicted.

The Supreme Court at General Term affirmed the judgment.

The Court of Appeals reversed the judgment.

EARL, J. [*after reviewing the facts, in passing upon this point, said*]: As the intent with which those moneys were received was one of the material inquiries, he should have been permitted to show that he did not receive them with any fraudulent intent. The case went to the jury in such a way as to enable the people to claim that not only the \$575 was received by the defendant with the intent to defraud Meeker, but that all

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the other moneys were received in the same way, and that the receipt of all the moneys had a tendency to show with what intent the \$575 was received; and hence the defendant clearly had the right to show that he had no fraudulent intent in receiving any of it.

The defendant, after answering that at the time he received the \$575 he did not intend to defraud Meeker, was also asked to state his intention at the time he received it, and the question was objected to on the part of the People, and the objection was sustained. We think that ruling was also erroneous. Upon the facts of the case, as they were developed at the trial, it was claimed by the defendant that when he received the \$575, it was his intention to replace the stock, to respond to Meeker whenever called upon for the stock, and that he was at the time able to do so. That was a theory he had a right to prove if he could, and the proof would bear upon the final issue whether he intended to cheat and defraud him, and hence he should have been permitted to answer the question.

STARIN v. KELLY.

New York Court of Appeals, 1882.

[Reported in 88 N. Y., 418.]

In an action against a sheriff for wrongful taking of plaintiff's property, which defendant justified under an attachment against plaintiff's vendor, claiming that the sale to him was in fraud of the vendor's creditors,

Held, not error to allow the plaintiff to testify that he did not make the purchase with intent to hinder, delay or defraud the vendor's creditors.

An action for the wrongful taking of property by the defendant as sheriff. The defendant justified under attachments issued to him against the property of one Theodore Besson, and claimed that the property was transferred to the plaintiff by Besson with intent to hinder, delay and defraud creditors.

Upon the trial plaintiff was called as a witness in his own behalf, and after giving evidence showing the purchase from Besson, and that he had no notice of any fraudulent intent on the

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part of Besson, was asked, "Did you make this purchase with any object or intention of aiding or assisting him to hinder, delay or defraud his creditors?" Objected to by defendant's counsel as irrelevant and incompetent; objection overruled and exception taken.

Witness answered: "In no way whatever; I considered him perfectly good."

Allen Lee Smidt, for plaintiff.

Vanderpoel, Green & Cuming, for defendant.

Judgment for plaintiff on a verdict.

The Superior Court at General Term affirmed the judgment.

The Court of Appeals affirmed the judgment.

EARL, J. [*after stating the facts*]: The statute declares that every conveyance or assignment of property, made with the intent to hinder, delay or defraud creditors, shall, as against the person so hindered, delayed or defrauded, be void, except that the title of a purchaser for a valuable consideration shall not in any manner be affected or impaired, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor (2 R. S., 137, §§ 1 and 5). To maintain the issue on the part of the defendant it was sufficient for him, in the first instance, to show Besson's fraudulent intent in making the sale. Then it was for the plaintiff to show that he purchased the property for a valuable consideration. The title would then be unimpeachable, unless the defendant should make it appear that he had previous notice of Besson's fraudulent intent or that he participated in the fraud.

Under the statute, a creditor assailing a transfer of property as fraudulent, may succeed by simply showing a fraudulent intent on the part of the vendor, or such intent on the part of the vendee. If, however, the vendee shows that he paid a valuable consideration for the property transferred to him, then proof of the fraudulent intent of the vendor only is not sufficient; then there must be proof also of a fraudulent intent on the part of the vendee or that he had notice of the vendor's fraudulent

intent. It is believed that these rules existed and were applied at common law before the statute against fraudulent conveyances was enacted. The proof of notice, on the part of the purchaser, of the fraudulent intent of the vendor, when it is necessary to establish it, need not be direct and positive, but such notice may be proved like any other fact in the case by circumstances, and proper and legitimate inferences to be drawn from the whole transaction. It would be sufficient for the party assailing the transfer to show that the purchaser was aiding and assisting the vendor in perpetrating a fraud, or that he, himself, in making the purchase, also had the same fraudulent intent, and from such facts notice could be inferred.

Hence, in such cases the good faith and intention of both parties is a proper subject of inquiry. In *Jackson v. Mather* (7 Cow., 301) it was held that a conveyance might be held to be fraudulent as to creditors upon proof of the fraudulent intent of the grantee without reference to the grantor's intentions. In *Waterbury v. Sturtevant* (15 Wend., 353) it was held that the question of fraud in such a case may depend upon the motive of both parties; that the purchase must be bona fide as well as upon a valuable consideration; and that the fraudulent intent of the grantee may be inquired into was also decided in 43 Barb., 448.

We are, thereof, of opinion that it is proper for the purchaser to testify directly in answer to such a question as here complained of, that he did not have any fraudulent intent, and that he made the purchase in good faith. That such a question is proper to be put to the purchaser was directly decided in the case of *Bedell v. Chase* (34 N. Y., 386). In that case, as we find by examining the papers in the action, one of the purchasers testified that he had no intent, nor was he aware that the vendors had sold the property then in question to hinder, delay or defraud their creditors. That evidence, as to the witness' intent, was objected to by defendant's counsel as irrelevant, immaterial and incompetent, and that it called improperly for witness to state his intent. The objection was overruled, and defendant's counsel excepted. Upon the argument of appeal in that case in this court, the precise point was presented for consideration by the counsel for the defendant, which was brought to our atten-

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tion in this case in the following language: "It was error to admit the testimony of one of the purchasers as to his intent or his knowledge of the intent of the vendors. The question for the jury to determine was solely whether the vendors made the sale with intent to hinder the creditors of their lawful suits. This court have determined that an assignor may be examined as to his intent, but have never held that a purchaser could be so examined."

It is thus seen that the precise argument was made in that case that has been made before us in this. But the court held that it was "legitimate to permit the examination of the plaintiffs as to their intention in making the purchase."

A contrary decision was made in *Hathaway v. Brown*, 18 Minn., 414, where it was held that a similar question put to a purchaser from a fraudulent vendor was incompetent. It is sufficient to say that that decision does not shake our confidence in the prior decision in this court referred to.

When there is evidence showing fraudulent intent on the part of the vendor, and no evidence tending to show a fraudulent intent on the part of a purchaser for a valuable consideration, then the question of fact to be submitted to the jury is whether the purchaser had notice of the vendor's fraudulent intent. Even in such a case, as bearing upon that question, the evidence here complained of should be received. In case the evidence is clear that he had such notice, this evidence will have no important bearing upon the issue. In a case of doubt and conflict it is entitled to some weight.

NOTE.—In *Seymour v. Wilson*, 14 N. Y., 567, it was held that an assignor charged with having assigned and disposed of his property with an intent to hinder, delay and defraud creditors, may be inquired of as a witness in a civil action affecting the validity of such assignment, as to his intent in making it.

DENIO, C. J. [*holding that exclusion was erroneous*]: Fraud against creditors always consisted in the corrupt intent of the parties to the transaction. The Statute of Frauds (13 Eliz., ch. 5) defines fraudulent conveyances as "Feigned, covinous and fraudulent feoffments," etc., "devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent to delay, hinder or defraud creditors," and they are described in the same language in the early re-enactments of that statute in this state (1 R. L., 75). In the Revised Statutes, though the language is.

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more refined, the meaning is the same. Fraudulent conveyances are such as are made "with the intent to hinder, delay or defraud creditors or other persons of their lawful suits," etc. (2 R. S. 137, 1). It is also declared that the question of fraudulent intent shall be a question of fact and not of law, and that no conveyance shall be adjudged fraudulent as to creditors solely on the ground that it was not founded on a valuable consideration (§ 4); and, moreover, the parties to such conveyances are declared to be guilty of a criminal offence (*id.* 690, § 3). In this case the party who made the alleged fraudulent transfer was a competent witness, and he was examined as to the facts of the transaction by the plaintiff who sought to set aside the conveyance. It may be that the circumstances disclosed by him would lead to the conclusion that the assignment was fraudulent notwithstanding anything which he might say as to his motives in making it. That was a question for the referee to determine after he had heard all the testimony respecting it, and it is one upon which we express no opinion. There are cases which present circumstances in themselves conclusive evidence of a fraudulent intent; and there no proof of innocent motives, however strong, will overcome the legal presumption: thus, where an insolvent debtor conveys his estate to a trustee with a reservation in his own favor, or with some provision which the courts have determined to furnish conclusive evidence of fraud. In such cases the oath of the assignor, that his motives were pure, would be idle, and could not affect the determination one way or the other. But where the facts do not necessarily prove fraud, but only tend to that conclusion, the evidence of the party who made the conveyance, when he is so circumstanced as to be a competent witness, should be received for what it may be considered worth (*Cunningham v. Freeborn*, 11 Wend.,*241, 254). This case did not present a feature which so conclusively established the alleged fraud that it was not incapable of being overcome by rebutting evidence. Among the facts which might be shown in answer to the plaintiff's case is certainly this, that the party making the conveyance had no intention of delaying or defrauding his creditors.

The judgment of the Supreme Court must, for this reason, be reversed.

NOTES OF OTHER CASES ON TESTIMONY AS TO OWN INTENT, MOTIVE, KNOWLEDGE, ETC.

Alabama: *Lewis v. State*, 1892, 11 Southern Rep., 259 (one accused of homicide cannot testify as to the uncommunicated intent with which he did the act). *Scott v. State*, 94 Ala., 80; s. c. 11 Southern Rep., 193 (upon a prosecution for larceny, it is error to permit a witness to testify that he claimed to be owner of the article stolen because the defendant asked him to do so). *Colorado*: *Love v. Tomlinson*, 1 Colo. App., 516; s. c. 29 Pacific Rep., 666 (a vendor and his agent, who negotiated a sale, may testify upon an issue of fraud, that there was no fraudulent intent). *Georgia*:

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Howard v. Savannah, etc., R. Co., 84 Ga., 711; s. c. 11 Southeast. Rep., 452 (in an action by a car inspector for personal injuries received while performing his duties, *held*, that it was error to permit the plaintiff to testify concerning his belief as to what protection he would receive while inspecting car wheels). Central R. & Bk'g Co. v. Kent, 84 Ga., 351; s. c. 10 Southeast. Rep., 965 (a road-master, who testifies that shortly before an accident he examined a railway embankment, may state that he apprehended no trouble therefrom). *Illinois*: Chamberlain v. Bain, 27 Ill. App., 634 (a person cannot testify that he was willing and ready to perform his agreement). *Indiana*: Freeman v. Sanderson, 123 Ind., 264; s. c. 24 Northeast. Rep., 239 (a witness may give his understanding of alleged slanderous words). *Kansas*: Gentry v. Kelley, 49 Kan., 82; s. c. 30 Pacific Rep., 186 (it is not error to permit a mortgagee to testify as to her intent in taking a mortgage, validity of which is in issue). *Louisiana*: State v. Thomas, 41 La. Ann., 1088; s. c. 6 Southern Rep., 803 (a witness may testify that he expected to meet a person at a certain place). Hutchins v. Ford, 82 Me., 363; s. c. 19 Atlantic Rep., 832 (a master of a vessel may testify that in selecting a mate, he had every reason to suppose that the man was sufficient for a coasting mate and that he believed that he was capable). *Massachusetts*: Stevens v. Stevens, 150 Mass., 557; s. c. 23 Northeast. Rep., 378 (a grantor may testify that she had never parted with the possession of the deeds with any intent to pass the property purported to be conveyed). *Michigan*: Thompson v. Clay, 60 Mich., 627 (it is error to permit a person to testify as to the effect of a conversation upon his mind). Farrand v. Aldrich, 85 Mich., 593; s. c. 48 Northwest. Rep., 628 (a person, who has read a libelous article containing a misspelled name, may testify that he understood it to mean the plaintiff). Collier v. Porter, 88 Mich., 549; s. c. 50 Northwest. Rep., 658 (in an action against a firm for money borrowed, plaintiff may testify that she had no knowledge of any fraudulent attempt by a member of the firm to make his individual debt appear a firm debt). *Missouri*: Vawter v. Hultz, 112 Mo., 633; s. c. 20 Southwest. Rep., 689 (in answer to an inquiry as to his purpose in drawing and firing his pistol, defendant replied, "to protect my life and person," *held*, that this answer was properly stricken out). State v. Mason, 24 Mo. App., 321 (the intent with which acts were done may be proved by the direct testimony of the actors). *Nebraska*: Cressler v. Rees, 43 Northwest. Rep., 363 (the testimony of a party as to what representations of the other party induced him to make a trade is not conclusive). *New Hampshire*: Fiske v. Gowing, 61 N. H., 431 (a witness is not required to state the exact words of a conversation, but may state what he understood from the language and conduct of a person). Clark v. Marshal, 62 *id.*, 498 (the knowledge or intent with which an act was done, may be proved by the direct testimony of the actor). *New York*: Moore v. N. Y. El. R. Co., 24 Abb. N. C., 74; s. c. 29 State Rep., 432 (a tenant cannot testify as to whether the reason for his going away was in any way connected with the effect produced by the operation of defendant's elevated railway in front of the premises). McCormack v. Perry, 47 Hun, 71; s. c.

14 State Rep., 154 (in an action for malicious prosecution defendant may testify that he was not actuated by malice). *Hahlo v. Grant*, 31 State Rep., 919; s. c. 10 N. Y. Supp., 168 (the seller's clerk may testify that in ordering the goods purchased to be delivered, he relied partly on the purchaser's statements as to his financial condition and partly on a commercial agency's report). *People v. Moore*, 50 Hun, 356; s. c. 20 State Rep., 1 (on an indictment for an assault, evidence as to the manner in which words spoken by defendant at the time of the assault were understood by the party assaulted is admissible). *Lally v. Emery*, 54 Hun, 517; s. c. 28 State Rep., 127; 8 N. Y. Supp., 135 (in an action for a slander charging a crime, defendant may testify in mitigation that he did not intend to charge a crime). *Wilcox v. Joslin*, 32 State Rep., 423; s. c. 10 N. Y. Supp., 342 (a witness cannot testify as to what he meant by a certain sworn statement). *Fox v. Fort Edward*, 48 Hun, 363; s. c. 16 State Rep., 303; affd. without opinion in 121 N. Y., 666 (in an action for personal injuries, upon cross-examination the plaintiff testified that he had walked in the street before the accident and not on the sidewalk. *Held*, that it was proper to let him state on re-direct examination that he returned to the sidewalk because he had seen a foot-passenger knocked down in the street by a passing team). *North Carolina: Wolf v. Arthur*, 112 N. C., 691; s. c. 16 Southeast. Rep., 843 (upon an issue as to whether a deed was executed in fraud of creditors, one of two grantees as a witness cannot be asked if the trade was a *bona fide* transaction since although he may testify as to his own good faith, he cannot testify to that of the other parties). *Nixon v. McKinney*, 105 N. C., 23; s. c. 11 Southeast. Rep., 154 (where it is material to know whether a grantor acted in good faith in making a deed, or the motives of the grantee in taking the benefit of the conveyance, either may testify as to his own intent in the transaction). *Texas: Berry v. State*, 30 Tex. App., 423; s. c. 17 Southwest. Rep., 1080 (upon the trial of an indictment for an aggravated assault in striking a boy, defendant may testify as to his object and purpose in striking him). *Robertson v. Gourley*, 84 Tex., 575; 19 Southeast. Rep., 1006 (upon the issue as to whether a sale was fraudulent as to seller's creditors, the seller may be asked if in making the sale he was trying to put his property out of the reach of anyone; s. p. *Schmick v. Noel*, 72 Tex., 1). *Baldrige & C. Bridge Co. v. Cartrett*, 75 Tex. 628; s. c. 13 Southwest. Rep., 8 (to disprove contributory negligence in not jumping when his team was backing off a bridge, plaintiff may testify that he looked around and saw a railing and thought it was sufficiently strong to stop the team). *Kansas, etc., R. Co. v. Scott*, 1 Tex. Civ. App., 1; s. c. 20 Southwest. Rep., 725 (in an action in which the value of a railway pass repudiated by defendant was an element of damage, plaintiff cannot testify as to the probable number of trips he would make over the road before the pass would expire). *Smith v. Sun Pub. Co.*, 50 Fed. Rep., 399 (in an action for libel a witness cannot testify as to whom in his opinion the article applies, where it is ambiguous, but after stating that he knows to whom it applied he may state the facts and circumstances to show to whom it did apply).

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Washington: *Lyts v. Keevey*, 5 Wash. St., 606; s. c. 32 Pacific Rep., 534 (the maker of a note cannot testify, for the purpose of showing that the consideration for the note was illegal, that he supposed there was a criminal relation between his wife and the payee, except as preliminary to evidence showing the reasons for his supposition). *West Virginia*: *State v. Evans*, 33 W. Va., 417; s. c. 10 Southeast. Rep., 792 (one accused of murder may testify as to his own feelings when the fatal act was committed). *Wisconsin*: *Holtz v. State*, 76 Wis., 99; s. c. 44 Northwest. Rep., 1107 (upon a trial for murder defendant may testify that he went to the place where the homicide was committed for the purpose of getting a girl away, but cannot state the character of the place).

Slocovich v. Orient Mut. Ins. Co., 108 N. Y., 56.

SLOCOVICH v. ORIENT MUTUAL INSURANCE CO.

New York Court of Appeals, 1887.

[Reported in 108 N. Y., 56.]

It is for the judge at the trial to determine whether a witness is competent to testify as an expert.

The decision of a trial judge as to whether a witness, offered as an expert, had those qualifications, is not subject to review in the Court of Appeals, where it appears from the preliminary examination of the witness that it was a fair matter for the judgment of such trial judge.

Plaintiff sued to recover upon a marine policy. The facts material to the ruling fully appear in the opinion.

At *Trial Term*, judgment was entered for plaintiff upon a verdict.

The General Term of the Court of Common Pleas affirmed the judgment, without passing on this question.

The Court of Appeals affirmed the judgment.

EARL, J. [*after stating the facts involved*]: There was an issue upon the trial as to the value of the vessel at the time of her insurance and of her destruction soon thereafter by fire; and several experts were called and testified upon both sides, as to her value, who varied widely in their judgments. Among the witnesses called on the part of the defendant was Francis A. Martin, who testified that he was a marine surveyor; that he had been engaged in that business altogether twenty-five years; that he had followed the sea six or seven years and had been in command of a vessel; that his business had led him to be familiar with the market-values of vessels in the port of New York for ten years; that in his regular business he had been called upon to value vessels, principally by adjusters of aver-

ages; that he knew the ship Zorka and had been on board of her a good many times, but not within five or six years. He stated, in answer to a question that he thought he was able from his experience and personal knowledge, and the personal examination he made of her, to form an opinion as to her value in 1883. He was then asked this question: "What, in your judgment, judging from your personal knowledge of the vessel, gathered from your personal observation, and your knowledge of the ordinary results of wear and tear in ordinary use, was the market value in the port of New York of the ship Zorka in the month of April, 1883?" This question was objected to by the plaintiff and excluded by the court, on the ground, as we must assume from the record, that the witness did not have sufficient knowledge of the vessel to testify as to her value at the time she was burned. It will be observed that the witness was asked for his judgment, based solely upon his personal knowledge. It was for the trial judge to determine in the first instance whether the witness was competent as an expert to testify to the value of this vessel. He had not seen her for five or six years, and knew nothing about her condition at the time of her destruction. It did not appear what her condition was at the time he last saw her, and it appeared that subsequently to that time, and after the year 1880, the plaintiffs had expended at least \$7,000 in repairing her. Under such circumstances we cannot say that the judge committed any error in excluding the testimony. If the evidence had been received, it certainly would not have been entitled to very much weight with the jury. While it would not, we think, have been erroneous to receive and submit the evidence to the jury for what it was worth, we cannot say, as matter of law, that the judge exceeded the bounds of a reasonable discretion in holding that the witness was not qualified as an expert to give an opinion as to the value of the ship at the time she was burned. The rules determining the subjects upon which experts may testify, and prescribing the qualifications of experts, are matters of law, but whether a witness offered as an expert has those qualifications is generally a question of fact to be decided by the trial judge. And it has been held that his decision in reference thereto is not review-

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able in an appellate court (*Searle v. Arnold*, 7 R. I., 582; *Dole v. Johnson*, 50 N. H., 455; *Jones v. Tucker*, 41 *id.*, 546; *Wright v. Williams*, 47 Vt., 222). Without going the full length of these cases, it is sufficient to hold here that the decision of the trial judge in such a matter should not be held to present an error of law, and on that account be reversed, unless it is against the evidence or wholly or mainly without support in the facts which appear. Here, we think, it was a fair matter for the judgment of the trial judge whether this witness had the requisite knowledge and qualifications to give an opinion as an expert as to the value of this ship; and hence we think that judgment is not the subject of review here.

[*Other rulings are here omitted.*]

All the judges concurred, except ANDREWS and PECKHAM, JJ., dissenting.

Judgment affirmed.

NOTE.—To similar effect: *Stillwell Mfg. Co. v. Phelps*, 130 U. S., 520; *Perkins v. Stickney*, 132 Mass., 217; *Sorg v. First German Congregation*, 63 Penn. St., 156.

GREGORY v. FICHTNER.

New York Common Pleas, General Term; May, 1891.

[Reported in 27 Abb. N. C., 86.]

Upon an appeal from a judgment of affirmance by the general term of the City Court of New York of a judgment entered upon a verdict, the Court of Common Pleas has no jurisdiction to review the weight of evidence, but is confined to a consideration of the errors of law apparent on the record.

Proof that defendant had possession of plaintiff's property as bailee, and that when plaintiff demanded it of him he gave her a push and said, "Go away from here; whatever I have I will keep," furnishes sufficient evidence of demand and refusal to establish a conversion.

Where property is deposited with another for an indefinite period, the Statute of Limitations does not begin to run against an action by the owner for its conversion, until a demand and refusal.

A plaintiff suing for the conversion of property by the defendant's testator, is not incompetent under Code Civ. Pro., § 829, to testify to the value of the property.

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It is error to permit a witness, although the owner, to testify to the value of certain jewelry, without some evidence of her competency as an expert. Proof that she had purchased it, without stating the price, is insufficient.

It is error to permit a witness to give an opinion on a matter requiring expert knowledge without first requiring proof of her competency; and simply to permit the adverse party to cross-examine as to that point, is improper, as in effect casting the burden of proving incompetency on the objecting party.

A recovery for conversion cannot be sustained where the only evidence in the case as to value of the property is the opinion of a witness whose competency as an expert has not been established.

In an action for conversion by defendant's testator of certain jewelry deposited with him, it appeared that plaintiff placed the jewelry in a box which she left with a third person who delivered it to defendant without knowledge of its contents.—*Held*, that plaintiff was not competent to testify to the contents of the box; that such testimony related to a personal transaction with the deceased in which the third person was a mere unconscious intermediary.

Appeal from judgment and order of the General Term of the City Court of New York, affirming judgment on a verdict and an order denying motion for a new trial.

Amelia Gregory sued August Fichtner, as executor, etc., for conversion of several pieces of jewelry by defendant's testator.

John A Strayley, for appellant.

John Stacom, for respondent.

PRYOR, J. The contention that the proof was insufficient to authorize a verdict for the plaintiff, is clearly untenable; and upon an appeal from a judgment of affirmance by the general term, we have no jurisdiction to review the weight of evidence. We are confined, therefore, to the consideration of errors in law apparent on the record.

As intimated, the court rightly refused to dismiss the complaint, either for intrinsic defect or insufficiency of proof. The complaint alleges property in the plaintiff's possession by the defendant as bailee; his refusal on demand to deliver the jewelry, and its value. Nothing more was requisite to a cause of action for conversion.

And of these allegations something more at least than a

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scintilla of evidence was adduced. The criticism of the appellant, is, that the jewelry owned and demanded by the plaintiff, was not identified, by proof, as the jewelry in controversy; but, as only one parcel of jewelry is indicated either by the pleadings of the evidence, the inference is irresistible, that the jewelry demanded by the plaintiff was the jewelry detained by the defendant.

The appellant argues that the demand and refusal in evidence was not sufficient proof of conversion; because it was not apparent that the defendant had either possession of the jewelry or had parted with it to evade delivery of it. But, if a defendant has parted with possession, it is not necessary to show that he did so with a fraudulent purpose. The facts here fail to support the proposition on which the appellant relies, namely: "If, at the time the demand is made, the goods are in the actual possession of another, and the person of whom the demand is made has not, and never had, any control over them, the fact that he claims the goods, and declares they are his own property, will not amount to a conversion (*Andrews v. Shattuck*, 32 Barb., 396), but the evidence presents rather that other criterion of conversion propounded by EARL, J., in *Gillet v. Roberts* (57 N. Y., 28), namely: where mere words are relied upon, they must be uttered under such circumstances, in proximity to the property, as to show a defiance of the owner's right, a determination to exercise dominion and control over the property, and to exclude the owner from the exercise of his rights." The uncontradicted evidence is, that defendant's testator had possession of the jewelry; and that when the plaintiff demanded it of him "he gave her a push" and said "go away from here; whatever I have I will keep." A refusal to deliver under such circumstances, furnishes plenary proof of conversion.

The appellant further contends that his plea of the Statute of Limitations was made good by uncontroverted evidence. The proof is that in 1872, the defendant received the articles of jewelry on deposit for an indefinite period, and that in 1884 or 1885, the return of them was demanded by the plaintiff. The action was commenced in February, 1885. In the absence of evidence of any actual conversion, the refusal to deliver on demand, constituted the conversion; and indisputably the statute com-

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menced to run at the time of that refusal. It was so at common law, and it is so by the express terms of the Code, which provides that "where there was a delivery of personal property, not to be returned at a fixed time or upon a fixed contingency, the time must be computed from the demand." § 410, Sub. 2: "This section was a codification of the law as it existed at the time of its adoption, and created no new rule of law" (*King v. Mackeller*, 109 N. Y., 215, 224), and at common law the rule was elementary, that "where a demand is necessary to perfect a right of action, the statute runs from the demand" (13 Am. & Eng. Ency. of Law, 721; *Payne v. Gardiner*, 29 N. Y., 146; *Smiley v. Fry*, 100 *id.*, 262). The authority relied upon by the appellant (*Ganley v. Troy*, 98 *id.*, 487) instead of sustaining, quite clearly discredits his contention. The distinction is between a deposit for a determinate and a deposit for an indeterminate period; and in the latter case, the Code, § 410, expressly provides that "the time must be computed from the demand." Here, the jewelry was not to be returned "at a fixed time or on a fixed contingency;" in other words, the deposit was for an indefinite time; and so the Statute of Limitations is no answer to this action (*Fry v. Clow*, 50 Hun, 574).

So far as to the allegations of error, which we find to be untenable; we proceed to indicate others which we deem to be well supported and of sufficient moment to require a reversal of the judgment.

Although the action be against an executor, the plaintiff was not incompetent under section 829 of the Code, to testify to the value of the jewelry (*Burrows v. Butler*, 38 Hun, 157). But, as a condition of the admissibility of her opinion it was necessary to show that she was competent to form an opinion; in other words, that she was an expert on the value of jewelry. That a witness cannot testify as an expert unless he be an expert, is elementary law and familiar practice (7 Am. and Eng. Ency. of Law, 514). Yet, here, without any evidence whatever of her qualification to speak as to the value of the jewelry, the plaintiff was allowed to state the value as \$1,857. True, she had said that she bought the jewelry, but she did not give the price; and the mere fact of the purchase was no proof of her acquaintance

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with the value. On objection to the evidence as incompetent, the learned trial judge answered: "I will allow you" (defendant's counsel) "to cross-examine the witness concerning her knowledge as to the value of this jewelry"—implying that the burden is upon a party to prove the incompetency of an adverse witness, rather than upon the party producing him to show his competency.

This error in the admission of evidence was palpably prejudicial to the appellant; for the case discloses no other proof of value to sustain the verdict; and in his charge, the learned trial judge assumed that the value was so conclusively shown by the plaintiff's testimony as not to be a question for the jury. In vain the respondent cites *Jones v. Morgan* (90 N. Y., 4, 10), as establishing the sufficiency of the proof of value in the present case; for there was evidence of the cost price and of deterioration by age and use, while here neither of those facts is exhibited.

Another error in the admission of evidence is equally fatal to the judgment.

It was, of course, an indispensable part of the plaintiff's case to prove what and how much jewelry had been delivered to the defendant; and the fact was thus shown: The plaintiff testified that she put the jewelry in a box; that the jewelry consisted of such and so many pieces; and that she left the box in custody of Mrs. Immer with directions to deliver it to the defendant's testator. Mrs. Immer then testified that she did not know what was in the box, but that she delivered it to the defendant's testator; and so, and not otherwise, was it proved that the defendant's testator received the particular pieces, and all the pieces of the jewelry for the conversion of which the plaintiff has recovered damages. The defendant moved to strike out the plaintiff's testimony as to what jewelry was delivered to the defendant's testator, on the ground that it was incompetent under section 829 of the Code; but the motion was denied, with an exception. The defendant then moved the court for a dismissal of the complaint on the ground "that there is no competent evidence of the delivery of the articles," which was also denied with an exception. Finally, the defendant requested the court to charge the jury "that there is no competent proof of the delivery of

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the jewelry," and this, too, was denied with an exception. Thus the point is duly presented, that the plaintiff was incompetent, under section 829 of the Code, to testify to the delivery of the jewelry to the defendant's testator.

Did the plaintiff's testimony go to prove a personal transaction or communication with the deceased? Mrs. Immer did not show what jewelry was delivered to the deceased, for she did not know. She proved only that she delivered the box to him. It was by the evidence of the plaintiff that the jury were informed what jewelry was delivered to the deceased. Strike out the plaintiff's testimony and there is no evidence of that delivery. And the transaction was between the plaintiff and the deceased, although an unconscious intermediary was employed, as strictly and essentially as if the box had been sent by the plaintiff to the deceased through the agency of the post office or an express company. Suppose an action for the conversion of articles enclosed in an envelope and transmitted by mail; a third party proves the delivery of the envelope to the deceased, and then the plaintiff offers to testify to the contents of the envelope; would not such evidence be rejected as involving, strictly and essentially, a personal communication by the plaintiff to the deceased? Disclosure of the contents of the envelope is not by the plaintiff to the postmaster, but is made, for the first time, to the deceased. So here, the contents of the box were not divulged to Mrs. Immer, and she did not reveal them to the deceased; but knowledge of those contents was, in the most literal sense, imparted to the deceased by the plaintiff. Plainly it was a personal transaction and communication between the plaintiff and the defendant's testator.

Statutes are to be construed so as to effectuate the remedy for which they are designed; and the mischief against which section 829 of the Code was directed, is testimony by an interested party of a transaction or communication which the decease of the other party makes incapable of contradiction. The present case involves the mischief; since the plaintiff testified to a transaction and communication as to which only the deceased could speak; and being within the mischief of the former law, it is within the scope of the remedy which the new law contemplates. "The

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statute is a beneficial one, and ought not to be limited or narrowed by construction. Although it must appear that the interview or transaction sought to be excluded was a personal one, it need not have been private or confined to the witness and the deceased. A contrary rule would defeat the reasonable intent of the statute, that a surviving party should be excluded, as one interested, from maintaining by his testimony, an issue which in any degree involved a communication or transaction between himself and a deceased person" (*Holcomb v. Holcomb*, 95 N.Y. 316, 325; *Heyne v. Doerfler*, 36 N. Y. St. Rep., 497).

"Any fact as to which a party is prohibited from testifying by section 829 of the Code, cannot be established inferentially from his testimony" (*Johnson v. Spies*, 5 Hun, 468). "A fact that cannot be proved by him directly cannot be established inferentially by his testimony" (*Jacques v. Elmore*, 7 Hun, 675; *Grey v. Grey*, 47 N. Y., 554).

We are of the opinion that the evidence in discussion was incompetent, and its admission error.

Judgment reversed, and new trial, costs to abide the event.

DALY, C. J., and ALLEN, J., concurred.

NOTE.—The adversary may interrupt with cross-examination as to the qualifications of the alleged expert (Abb. Tr. Brief on the Facts, 228, § 579, and *cas. cit.*); it has been held error to refuse to allow such preliminary cross-examination. *First Nat. Bk. of Easton v. Wirebach*, 14 Rep., 606; *s. c.*, more fully, 12 Weekly N. C., 150.

Where such witness was allowed to testify in chief, without objection on the part of the adversary, but during cross-examination a motion was made to strike out his testimony on the ground that the witness was not competent to testify as an expert.—*Held*, that the burden was upon the adversary to make it appear affirmatively that the witness was disqualified. *Mercer v. Vose*, 40 N. Y. Super. Ct., 218.

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FERGUSON v. HUBBELL.

New York Court of Appeals, 1884.

[Reported in 97 N. Y., 507.]

The question as to what is a proper time to burn a fallow, is not one for expert witnesses, for it does not require any peculiar habits or study in order to qualify a man to understand it.

To warrant expert evidence it is not enough that the witness may know more of the subject and may better comprehend it than the jury; but the subject must be one relating to some trade, profession, science or art in which persons instructed therein, by study or experience, may be supposed to have more skill and knowledge than jurors of average intelligence may be presumed generally to have.

Plaintiff sued to recover damages resulting from a fire negligently set by defendant. The facts upon which the rulings are based are sufficiently presented in the opinion.

At *Circuit*, judgment was entered for defendant upon a verdict.

The General Term affirmed the judgment, being of opinion that expert evidence was properly admitted upon the question whether the fire was set at a proper time; that such question would depend on the degree of dryness, on the force of the wind and its direction, and on many other circumstances which are hardly capable of such accurate description that a witness could give a jury an accurate idea of the facts.

The Court of Appeals reversed the judgment.

EARL, J. On the 17th day of May, 1880, and for a long time prior thereto, the plaintiff owned a certain lot of land numbered 104 in the county of Warren in this State, and the defendant owned lot 116, situated north of 104, and lot 105, situated west of 104. The defendant had leased lot 105 to Charles Hammond to work upon shares, under an agreement by which each party was to furnish half the seed and have half the crops, and the defendant was to pay Hammond \$10 per acre for clearing so much of the lot as he should choose to clear. On Thursday, the 13th day of May, Hammond, for the purpose of clearing up a portion

of his lot, set fire to some wood and brush thereon. That fire burned moderately and smouldered Friday, Saturday, Sunday and until Monday, when the wind began to blow and the fire started up and passed out of that lot upon lots 116 and 104. On Monday, the 17th, in the forenoon, the defendant, for the purpose of clearing up a portion of lot 116, set a fire upon that lot, and either at the time he set the fire or shortly after, the wind began to blow a sharp gale. One or both of the fires thus set upon these two lots passed upon lot 104 and set fire to and burned down a house and barn upon that lot belonging to the plaintiff; and this action was brought by him to recover his damages thus sustained.

[*A ruling on the question of defendant's liability is omitted.*]

The case was submitted to the jury to determine whether the fire which destroyed the buildings came from lot 105 or from lot 116, and they were also permitted to determine, if it came from lot 116, whether it was set at a proper time and managed in a proper manner. They found generally for the defendant, and it is impossible to know whether they based their verdict upon the ground that the fire was set upon lot 105, or upon the ground that it was set at a proper time and managed in a careful manner upon lot 116. And it is therefore necessary to inquire whether error was committed in the rulings to which we will now call attention.

There was evidence tending to show that the fire was set upon lot 116 by the defendant at a time when the land was very dry, and when the wind was blowing a strong gale in the direction of the plaintiff's lot. The defendant's witnesses gave evidence as to the condition of the land, the state of the weather, and of the wind and various other circumstances surrounding the fire. As a witness in his own behalf, he testified that he was a farmer, and that he had cleared and seen others clear land, and then he was asked this question: "What do you say as to whether or not as to that time, the fires were set there at that place, it was a proper time in your judgment for burning log heaps on a fallow that had been burned over?" The question was objected to on the part of the plaintiff as calling for a conclusion of the witness on a subject

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not proper to give an opinion ; that the witness could only state facts, and the jury must draw the conclusion. The trial judge remarked that the evidence would be received upon the principle that the witness was shown to have superior knowledge upon that subject. The plaintiff excepted to the ruling, and the witness answered: "I thought it was." Another witness, who was shown to have had experience in clearing land, was asked this question: "How was it at that time as to being dry enough for a proper time to burn a fallow?" which was objected to on the part of the plaintiff as calling for a conclusion. The objection was overruled and the witness answered: "It was dry enough." Another witness who was also shown to have had experience in clearing land was asked this question: "What do you say as to whether it was a proper time or not to burn a fallow?" to which there was the same objection and ruling, and he answered: "I should say it was a proper time to burn it, and advised him that way that day."

We think there was some evidence from which a jury could have found that the fire which destroyed plaintiff's buildings came from lot 116, and the jury may have found from the answers to these questions that the fire was set at a proper time, and thus may have been influenced to find their verdict in favor of the defendant.

It is contended on behalf of the plaintiff that the questions objected to were improper, and that the subject of the inquiry was not one proper for expert evidence. The questions related to a vital point in the case. The principal claim on the part of the plaintiff was that, in consequence of the wind and the dryness of the ground and the wood, brush and timber, it was an improper time to set the fire ; and whether it was or not, was the main question to be determined by the jury if they reached the conclusion that the fire came from lot 116. These witnesses were therefore asked their opinions upon a controlling issue which was to be determined by the jury. In answering the questions, they did not testify to facts, and they did not tell what they knew as matter of knowledge. They simply expressed opinions which were based upon the facts as they existed. The general rule of law is that witnesses must state

facts within their knowledge, and not give their opinions or their inferences. To this rule there are some exceptions, among which is expert evidence. Witnesses who are skilled in any science, art, trade or occupation, may not only testify to facts, but are sometimes permitted to give their opinions as experts. This is permitted because such witnesses are supposed, from their experience and study, to have peculiar knowledge upon the subject of inquiry which jurors generally have not, and are thus supposed to be more capable of drawing conclusions from facts, and to base opinions upon them, than jurors generally are presumed to be. Opinions are also allowed in some cases where, from the nature of the matter under investigation, the facts cannot be adequately placed before the jury so as to impress their minds as they impress the minds of a competent, skilled observer, and where the facts cannot be stated or described in such language as will enable persons not eye-witnesses to form an accurate judgment in regard to them, and no better evidence than such opinions is attainable. But the opinions of experts cannot be received where the inquiry is into a subject, the nature of which is not such as to require any peculiar habits or study in order to qualify a man to understand it.

It is not sufficient to warrant the introduction of expert evidence that the witnesses may know more of the subject of inquiry, and may better comprehend and appreciate it than the jury; but to warrant its introduction, the subject of the inquiry must be one relating to some trade, profession, science or art in which persons instructed therein, by study or experience, may be supposed to have more skill and knowledge than jurors of average intelligence may be presumed generally to have. The jurors may have less skill and experience than the witnesses and yet have enough to draw their own conclusions and do justice between the parties. Where the facts can be placed before a jury, and they are of such a nature that jurors generally are just as competent to form opinions in reference to them and draw inferences from them as witnesses, then there is no occasion to resort to expert or opinion evidence. To require the exclusion of such evidence, it is not needed that the jurors should be able to see the facts as they appear to eye-witnesses or to be as

capable to draw conclusions from them as some witnesses might be, but it is sufficient that the facts can be presented in such a manner that jurors of ordinary intelligence and experience in the affairs of life can appreciate them, can base intelligent judgments upon them and comprehend them sufficiently for the ordinary administration of justice.

The rules admitting the opinions of experts should not be unnecessarily extended. Experience has shown that it is much safer to confine the testimony of witnesses to facts in all cases where that is practicable and leave the jury to exercise their judgment and experience upon the facts proved. Where witnesses testify to facts they may be specifically contradicted, and if they testify falsely, they are liable to punishment for perjury. But they may give false opinions without the fear of punishment. It is generally safer to take the judgments of unskilled jurors than the opinions of hired and generally biased experts. A long time ago in *Tracy Peerage* (10 Cl. & Fin. 154, 191) Lord Campbell said, that skilled witnesses came with such a bias on their minds to support the cause in which they are embarked, that hardly any weight should be given to their evidence. Without indorsing this strong language which is however, countenanced by the utterances of other judges and of some text writers, and believing that opinion evidence is in many cases absolutely essential in the administration of justice, yet we think it should not be much encouraged and should be received only in cases of necessity. Better results will generally be reached by taking the impartial, unbiased judgments of twelve jurors of common sense and common experience than can be obtained by taking the opinions of experts, if not generally hired, at least friendly, whose opinions cannot fail generally to be warped by a desire to promote the cause in which they are enlisted.

From a careful examination of many cases in this and other states, we are satisfied that the questions objected to in this case should have been excluded.

In *Fraser v. Tupper* (29 Vt., 409), in an action like this, a question entirely similar to this, was held to be inadmissible. There the defendant offered to prove by farmers who were acquainted with the clearing of land by burning the same, and

who were upon the land the day the fires were set, and who described to the jury, as well as they could, the position of the fire and the force and direction of the wind, that in their opinions it was a suitable and proper and safe day for setting the piles on fire with reference to the position of the piles in respect to the plaintiff's coal and the force and direction of the wind. To this evidence the plaintiff objected, and it was excluded by the court, and to its exclusion the defendant excepted, and it was held that the ruling was proper. In the opinion of the court it is said: "There could be no difficulty in this case in the witnesses stating to the jury the position of the fires which were set by the defendant, their number and magnitude, the direction and the course of the wind, the position, distance and character of plaintiff's property and its exposure to injury from that source. The jurors, upon the question whether the defendant exercised proper care, could form as definite opinion, from the facts stated by the witnesses, as the witnesses themselves. The subject-matter is not one of science or skill, but is susceptible of direct proof, and in most cases the triers themselves are qualified from experience in the ordinary affairs of life, duly to appreciate the material facts when found. If there is any materiality attached to the force of the wind on that day, we do not see any difficulty in conveying a true idea of it, sufficient at least, for all practical purposes."

In *Higgins v. Dewey* (107 Mass., 494) the action was also like this and the defendant offered to prove by a surveyor and civil engineer of many years experience in clearing land by fire, who had observed the effects of wind on fires in different localities, and had been upon the land where the defendant set his fire and made a plan of it and was acquainted with the surrounding country, that there was no probability that a set fire under the circumstances in the case, as described by the witnesses, would be communicated to the plaintiff's land; but the judge excluded the evidence, and his ruling was held to be proper on the ground that the evidence offered related to a subject within the common knowledge of the jury. In *Luce v. Dorchester Mutual Fire Ins. Co.*, (105 Mass., 297), the action was to recover for a loss on a policy of insurance against fire upon a dwelling-house which

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the plaintiff had left unoccupied at the time of the loss, and for some time before; and the opinions of witnesses that leaving a dwelling-house unoccupied, for a considerable length of time, increased its liability to be destroyed or injured by fire, were held to be inadmissible, on the ground that the subject was within common knowledge. In *Sowers v. Dukes* (8 Minn., 23) the action was to recover for a breach of contract in neglecting to build and keep in repair a fence around a certain field, whereby plaintiff's crops were injured. Upon the trial the plaintiff, a witness in his own behalf, was asked this question: "Was the fence a proper fence to turn stock, and could they easily put their heads through between the fence and rider?" This question was objected to, on the ground that the jurors were the proper judges as to whether the fence was sufficient, after it had been described. The objection was overruled and the witness was permitted to answer; and the question was held to be incompetent, and the judgment was reversed for that reason. It was held that the witness should have stated the facts; that the jury should have based their judgments upon the facts, and that it was not a proper subject for opinion evidence. In *Enright v. S. F. & S. J. R. R. Co.*, (33 Cal., 230), in a suit against the defendant for injury to plaintiff's cattle caused by an insufficient fence, it was held that the evidence of farmers that the fence was sufficient to turn cattle was improper. In *Bills v. City of Ottumwa* (35 Iowa, 109), the defendant was sued for injuries to the plaintiff, alleged to have been sustained in consequence of the bad condition of the street, which caused him to be thrown from a wagon loaded with hay; and it was held, that the opinion of a farmer, that a wagon loaded in a manner in which the one was, upon which the plaintiff was riding, was not safe for riding upon over ordinary roads, was inadmissible. In *Concord R. R. v. Greely* (23 N.H., 237), in a proceeding to assess damages for a right of way for a railroad, it was held that the opinion of a farmer, as to the effect upon a farm of a railroad passing through it, was inadmissible. In *Paige v. Hazard* (5 Hill, 603), in an action for negligence in injuring and sinking a canal boat, the plaintiff, after proving the cause of action as alleged, called a witness who testified that he was a boatman and knew the boat in question previous to her

being injured, that he had raised sunken boats and caused them to be repaired, and he was then asked the following question: "From the description of the situation of the boat, as given by the witnesses, what would the damage be?" and it was held improper and that the witness' answer was inadmissible. In *Teall v. Barton* (40 Barb., 137), the action was brought to recover damages caused by fire communicated by a steam dredge, and it was held that a question put to a witness, who had had experience, as to whether he considered it dangerous to use a steam dredge without a spark-catcher, was properly overruled, it not being a question of science or skill, and not falling within the rule relating to evidence by experts. In *McGregor v. Brown* (10 N. Y., 114), the action was by a landlord against his tenant for waste; and it was held that the opinions of witnesses, that the acts complained of were not injurious to the inheritance, not waste, were inadmissible.

In all these cases it was held that the witnesses should be confined to a statement of the facts, and that it was the province of the jury to draw inferences and form judgments. In most of them it was as probable as it was here that some of the jurors might not know as much about the subject of inquiry, and not be as capable of forming opinions or drawing inferences from the facts as the witnesses; and yet it was held, as the subjects of inquiry were of such a nature that jurors generally might be presumed to have sufficient knowledge of them to enable them to discharge their duty when the facts were placed before them, that it was safer to rely upon them than upon the opinions of witnesses, however expert they might be. Here the subject of inquiry related to the common elements of fire, and wind, and dry wood, and brush, and timber, with which every man has some acquaintance; and whether under all the circumstances, it was a safe, prudent or proper act to set a fire, a jury with the common experience which, if not all men, most men have, would be sufficiently competent to form an opinion. This is not a case where it was impossible to place the facts before a jury. The character of the wind, the condition of the soil as to being dry or not, the character of the brush and timber, the nature of the ground, the distance, exposure, everything, could be proved so that the jury would

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have substantially as correct knowledge in reference to it as the witnesses ; if not as correct, they could acquire knowledge sufficiently correct to enable them to discharge their duty as jurors.

We have carefully examined the numerous cases cited in reference to this evidence in the brief of the learned counsel for the defendant, and none of them sustain its admission. They show that farmers may be permitted to give their opinions of the value of farms, and farm stock, and produce ; that witnesses may give their opinions on questions of identity or whether a person is under the influence of liquor, and as to many other matters. There is a broad range for expert evidence, but none of the authorities go far enough to hold that this evidence is within the proper range. The question of expert evidence was not involved in the case of *Hays v. Miller* (6 Hun, 320, and 70 N. Y., 112). The action in that case was brought to recover damages caused by fire to the lands of the plaintiff's intestate, through the alleged negligence of the defendant ; and the referee, instead of passing upon the question of negligence directly as one of fact, made special findings of the circumstances and from those found negligence as a conclusion of law, and he ordered judgment in favor of the plaintiff. The question under consideration upon the appeal was whether the inference of law was justified by the facts found. The appellant claimed that it was the duty of this court to review the conclusions of the referee, and decide as matter of law, whether the facts and circumstances found by him established that the burning upon the defendant's land was conducted in an improper and negligent manner, or at an improper time and season ; or whether it was conducted in a proper manner and at a proper time ; and we held that this court was not competent to draw the conclusions and inferences from the facts ; that that was a matter for the referee, and that we were concluded by the inferences and conclusions drawn from the facts by him ; and in discussing that question some language was used by the judge writing the opinion in this court which, it is claimed, favors the contention of the respondent here that these questions were proper to elicit expert evidence. But as we have seen, the learned judge writing the opinion did not have in mind the subject of expert evidence and was simply discussing the com-

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petency and power of this court to draw inferences from facts and circumstances found by the referee; and it was held, as we always hold in such cases, that the inferences are for the triers of facts.

We are therefore, constrained to reverse this judgment and grant a new trial as we think an important rule of evidence was violated. To uphold the propriety of these questions would carry the rule of expert evidence further than it has ever been carried in this state, and would be an unwarranted invasion of the rule which confines witnesses to facts, and excludes their opinions. It is important to maintain the rule in its integrity, and to permit as few invasions of it as the proper administration of justice will allow.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur, except MILLER, J., dissenting.

Judgment reversed.

STROHM v. THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY.

New York Court of Appeals, 1884.

[Reported in 96 N. Y., 305.]

In an action for negligently injuring plaintiff's child, an expert, after having testified as to anticipated consequences, that the child would always have some remnants of the injury, and was likely to retain the greater part of the symptoms or grow worse, was allowed to testify as to what worse developments *might* ensue.—*Held*, that this was error, because opening the door for the jury to include compensation for mere hazard in violation of the rule that to recover for future injuries there must be a reasonable certainty that they will result.

Plaintiff sued to recover damages for a personal injury resulting from defendant's negligence. The facts material to the ruling fully appear in the opinion.

At *Circuit*, judgment was entered for plaintiff on a verdict.

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The General Term affirmed the judgment without discussing the question.

The Court of Appeals reversed the judgment.

RAPALLO, J. We feel constrained to order a new trial in this case on account of the admission of the evidence of Dr. Spitzka as to the disorders into which the symptoms the plaintiff was said to have exhibited, might develop. Future consequences, which are reasonably to be expected to follow an injury, may be given in evidence for the purpose of enhancing the damages to be awarded. But to entitle such apprehended consequences to be considered by the jury, they must be such as in the ordinary course of nature are reasonably certain to ensue. Consequences which are contingent, speculative, or merely possible, are not proper to be considered in ascertaining the damages. It is not enough that the injuries received may develop into more serious conditions than those which are visible at the time of the injury, nor even that they are likely to so develop. To entitle a plaintiff to recover present damages, for apprehended future consequences, there must be such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury. (*Curtis v. Rochester & Syracuse R. R. Co.*, 18 N. Y., 541; *Filer v. N. Y. C. R. R. Co.*, 49 *id.*, 45; *Clark v. Brown*, 18 Wend., 229; *Lincoln v. Saratoga & S. R. R. Co.*, 23 *id.*, 425, 435.)

The witness, Dr. Spitzka, had personally examined the physical condition of the plaintiff, had received from him an oral statement of his symptoms, and had also been asked a hypothetical question, embodying a description of the apparent condition and symptoms exhibited by the plaintiff since the injury, as claimed by the plaintiff's counsel to have been established by the evidence. He was then asked what the symptoms related to him and those described in the hypothetical question indicated, and he answered that the elements of the hypothetical question proved epilepsy, while those related by the patient himself left that matter open, leaving it either as a preliminary stage of epilepsy or meningitis, or traumatic dementia, the witness could not decide which of the three. Being afterward

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asked as to the permanency of the condition of the plaintiff, he stated that it was very likely to be permanent. The question was then put to him by the plaintiff's counsel "What do you mean by very likely?" and he answered, "I mean that the boy will always have some remnants of this injury, some reminder of it, great or small, that is certain; how much he will retain I cannot tell but I think it very likely he will retain."

Here the witness was interrupted by an objection of the defendant's counsel to the words "very likely" and what followed, as entirely too speculative. The court overruled the objection, and an exception was taken. The witness then answered that the plaintiff was likely to retain the greater part of the symptoms if he did not develop worse signs. The following question was then put: "Q. You said it might develop into worse signs or conditions. What do you refer to?"

This question was objected to as speculative and hypothetical. The objection was overruled, and the counsel for the defendant excepted and the witness then answered: "A patient sustaining such injuries and presenting such premonitory signs, may develop traumatic insanity, or meningitis, or progressive dementia, or epilepsy with its results."

This answer was quite responsive to the question asked, which in substance called upon the witness to state what worse signs or conditions might be developed from the injuries sustained by the plaintiff; and the evidence being admitted by the court in the face of the objection that the inquiry was too speculative, the door was opened for the jury, in estimating the damages, to include compensation for the mere hazard to which the plaintiff was claimed to be exposed of being afflicted with the terrible disorders, or some of them, enumerated in the answer. It is impossible to reconcile the admission of this evidence with the authorities before referred to, or to say that the error could not have prejudiced the defendant or influenced the amount of the verdict.

The judgment should be reversed and a new trial ordered, costs to abide the event.

All concur; except RUGER, Ch. J., and DANFORTH, J., who

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dissent upon the ground that the question is not properly raised, and if it is, that evidence by experts of the probable and even possible consequences of the injury is admissible for the consideration of the jury.

Judgment reversed.

In an action of covenant for damages to plaintiff by the erection of another mill on the same stream with plaintiff's mill, a witness (who had been a workman in plaintiff's mill) was asked what damages, in his opinion, plaintiff had sustained.

This question was objected to.

Held, that the question was improperly admitted. COWEN, J., after adverting to the principles upon which opinions are allowed on matters of science, added: "Surely there can be nothing like science in ascertaining the loss of this plaintiff from a rival factory. After hearing particulars, one man can reckon up the amount as well as another, though none with perfect accuracy. That is no reason for receiving opinion, but a very powerful argument against it."

Norman v. Wells, 17 Wend., 136.

In an action for damages caused by defendant permitting water to run from his premises upon those of the plaintiff, a witness, Auld, was asked "What relative amount of water to the whole in Mr. Thomas' yard comes from the defendant's lot?" This was objected to by the plaintiff.

Held, to have been properly excluded; BRADY, J., saying: "The question which was put to Auld was scientific in its whole breadth and scope, and could not have been answered without some knowledge of laws with which he was not shown to be familiar."

Thomas v. Kenyon, 1 Daly, 132.

People v. McElvaine, 121 N. Y., 250.

PEOPLE v. McELVAINE.

New York Court of Appeals, 1890.

[Reported in 121 N. Y., 250.]

A hypothetical question to an expert, if based upon the whole evidence in the case, is incompetent, since it is also predicated upon the assumption that the witness recollects the testimony, and it would be impossible for the jury to determine the facts upon which the witness based his opinion, and whether such facts were proved or not.

The defendant was indicted for murder ; the sole defense was insanity.

The Court of Sessions entered judgment on a verdict of conviction.

The Court of Appeals reversed the judgment.

RUGER, Ch. J. [*after stating the nature of the crime*]: The sole defense attempted was the alleged insanity of the accused. Considerable evidence was given on the trial in his behalf tending to show that he possessed a defective mental organization and was subject to delusions and hallucinations, which were claimed to be evidence of his insanity. Two witnesses were called on his behalf, as experts, who respectively gave evidence tending to show a belief that he was, to a certain degree, insane. Two expert witnesses were also called on behalf of the prosecution to give opinions upon the question of the defendant's sanity, and each testified that he was, in their opinion, sane. It cannot be questioned but that the evidence of these witnesses was material and had weight with the jury upon the question of the defendant's mental condition. If these opinions were based upon an erroneous hypothesis and were founded in any material respect upon indefinite or unascertainable conditions, or upon considerations which were not the proper subject of expert evidence, they must be regarded as having been erroneously admitted. The only serious objection to the conviction arises upon an exception to the ruling of the court, permitting Doctor Gray, a witness for the prosecution and an expert of high reputation and character, to answer, against objection, a hypothetical question as to the

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defendant's sanity. The question put by the district attorney, and the proceedings accompanying the question were as follows:

"Q. Now are you able to say whether in your judgment, based upon all the testimony, the acts of the defendant on the night of the homicide, the testimony as to his past life given by the witnesses in his defense, and based upon the whole case, whether this young man is sane or insane?"

Mr. Curtis: I object, as it is not a question properly put.

The Court: Why not?

Mr. Curtis: It is too vague and indefinite. In order to put a hypothetical question properly, so say the Court of Appeals, it must consist of specifically proven facts, which come within the pale of the proof; not where a person, for instance, is permitted to give an anomalous opinion.

The Court: You had better frame the question.

Mr. Ridgway: Then I will ask the stenographer to read all the evidence to this witness.

The Court: I don't see why the question is not competent.

Mr. Curtis: The way is, to take compact, substantial, concentrated oral proof, what the learned counsel relies on to prove the defendant insane.

The Court: Where a medical witness, who is called as an expert, has been in court during the whole trial and heard all the testimony in the case, everything that has been done and said by everybody, I don't see why it is not competent to ask him whether upon those facts, all he heard testified to, he thinks the defendant is sane or insane. This witness has heard all that has been sworn to by everybody.

To the witness: You have heard all the testimony in the case?

The District Attorney: Based upon the whole testimony of the prosecution and the defense, including the hypothetical question put by Judge Curtis, and everything that you have heard sworn to here, now will you answer the question?

The defense excepts.

A. I have formed an opinion.

Q. State it.

The defense excepts.

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A. I believe the defendant is sane.

Q. What do you believe he was at the time of the commission of the offense?

A. I believe he was sane at the time of the commission of the offense."

We cannot doubt but that this question was improper. The witness was thus permitted to take into consideration all the evidence in the case given upon a long trial extending over nine days, and, upon so much of it as he could recollect, determine for himself the credibility of the witnesses, the probability or improbability of their statements, and drawing therefrom such inferences as, in his judgment were warranted by it, pronounce upon the sanity or insanity of the defendant. It cannot be questioned but that the witness was by the question put in the place of the jury and was allowed to determine upon his own judgment what their verdict ought to be in the case.

It hardly needs discussion or authority to show the impropriety of this question, and indeed the learned trial judge, at a subsequent stage of the proceedings, emphatically protested against the implication that he had permitted such a question to be put to the witness.

A reference to the record, however, shows that the court must then have been laboring under some misconception as to what had really taken place. This might reasonably have happened to any judge from the prejudice excited by the exasperating mode in which the defense was conducted by the prisoner's counsel. The rule as to the conditions governing the formation of hypothetical questions to experts, has frequently been discussed and illustrated in the reported cases in this court. It was said by Judge Andrews, in the case of *People v. Barber* (115 N. Y., 475, 491), that: "The opinion of medical experts as to the sanity or insanity of the defendant, based upon testimony in the case, assumed for the purpose of the examination to be true, was undoubtedly competent. So, in connection with their opinion, they could be permitted to state the reasons upon which it was founded. But inferences from facts proved are to be drawn and found by the jury, and cannot be proved as facts by the opinion of witnesses."

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In *Reynolds v. Robinson* (64 N. Y., 589, 595), Judge EARL, in speaking of evidence attempted to be given under a hypothetical question, says: "In such a case it is not the province of the witness to reconcile and draw inferences from the evidence of other witnesses and to take in such facts as he thinks their evidence has established, or as he can recollect and carry in his mind, and thus form and express an opinion. His opinion may be obtained by stating to him a hypothetical case, taking in some or all of the facts stated by witnesses, and claimed by counsel putting the question to be established by their evidence, and when the question is thus stated the witness has in his mind a definite state of facts, and the province of the triers, whether referees or jurors, is not interfered with." So too it was said by Judge Miller, in *Guterman v. Liv., N. Y. & Phila. S. S. Co.* (83 N. Y., 358), that it is not the province of an expert witness "to draw inferences, or to take in such facts as he can recollect and thus form an opinion."

In *Gregory v. N. Y., L. E. & W. R. Co.* (28 N. Y. S. R., 726, the court say: "An expert witness cannot be asked to give an opinion based upon what he has heard other witnesses testify. Such opinion must be based on a hypothetical question containing facts which are assumed to have been proven." The case of *People v. Lake* (12 N. Y., 358) is not an authority for appellant on the question under discussion.

The court in that case did not concur in the opinion written, but placed their decision upon two propositions, one of which only bears upon the question here, and that was that "the Court of Oyer and Terminer erred in permitting physicians, who did not hear all the evidence relating to the mental condition of the prisoner, to give opinions as to his sanity, founded on the portion heard by them." The question was not mooted or decided whether, in case they had heard all of the evidence, they could give opinions based thereon, but it passed off solely upon the question whether a person who had heard only a part of the evidence upon a trial, could give an opinion based upon the portion of the evidence so heard by him. It is true that an implication may be drawn from the decision that if the witness had heard the whole evidence he might properly have given his

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opinion, but that question was not in the case and it falls far short of being an authority on the point.

The case of *Sanchez v. People* (22 N. Y., 147, 150) is to a similar effect. Two opinions were delivered in that case, but neither of them secured the concurrence of the court. The decision was placed upon the decision in the *Hartung* case, and had no reference to the question under consideration here. The case of *People v. Thurston* (2 Parker's Cr. R., 49) was in the Supreme Court, and failed to secure the concurrence of the court in the grounds upon which it was decided.

No rule was, therefore legally formulated by the decision, but the inferences to be drawn from the opinions read are plainly opposed to the People's contention here. No other decisions from this state are cited, and we deem it unnecessary to discuss or consider the rules prevailing in other countries in view of the reported decisions made in our own courts.

An attempt was subsequently made to, in some degree, cure the error committed, by proving by the witness that in answering the question he assumed the truth of the evidence given by the defendant's witnesses; but we think this did not remove the vice inhering in the question. Even as thus affected, it left the uncertainty of his memory as to all of the evidence in the case, and the freedom of his judgment as to all other evidence to give such weight as he should in his own mind determine it was entitled to, and substantially allowed him to usurp the functions of the jury in deciding the questions of fact.

We think it is not competent in any case to predicate a hypothetical question to an expert upon all of the evidence in the case, whether he has heard it all or not, upon the assumption that he then recollects it, for it would then be impossible for the jury to determine the facts upon which the witness bases his opinion, and whether such facts were proved or not. Suppose the jury concluded that certain facts are not proved, how are they, in such an event, to determine whether the opinion is not to a degree, based upon such facts? When specific facts, either proved or assumed to have been proved, are embraced in the question, the jury are enabled to determine whether the answer to such question is based upon facts which have been proved in

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the case or not and whether other facts bearing upon the correctness and force of the answer are contained therein, or have been omitted from it; but in the absence of such a question the evidence must always be, to a certain extent, uncertain, unintelligible and perhaps, misleading.

We regret that an error of this character is found in a case which was otherwise tried by the learned court with an intelligent understanding of and adherence to the rules of law applicable to the case, and a strict regard to the rights of the accused; but in compliance with the uniform practice of courts in capital cases to avoid even the possibility of injustice to the accused, we think the error referred to requires a new trial.

All concur.

Judgment reversed.

NOTE.—In *Link v. Sheldon*, 136 N. Y., 1, an action to recover damages for malpractice in failing to properly redress a fractured arm, an expert, having no knowledge of the case, and having first been asked a hypothetical question on an assumed case involving consequences to the arm, for neglect to redress within a certain time, was asked whether he could trace any of the results he had heard testified to, to the lack of redressing on a certain day. *Held*, incompetent and properly excluded, since to have answered the question would have required the witness to pass upon, or to draw inferences from the evidence in the case by another witness. The court say (GRAY, J.): “An expert witness should be confined to questions which contain in themselves the facts assumed to be proven, and upon which his opinion is desired.”

(Citing *Reynolds v. Robinson*, 69 N. Y., 589.)

In the *Matter of Snelling*, 136 N. Y., 515, a contest over the probate of a will based on want of capacity and undue influence, the contestants called two witnesses, who testified at length to conduct of the testatrix tending to establish their objections. The proponents then called two physicians, who both testified they had read the whole of the testimony of the two witnesses, and were each asked: “Assuming their testimony to be true, and basing your opinion upon such testimony, what would you say as to the mental condition of Mary Snelling, say in June, 1890?” The physicians were allowed to answer, over the contestants’ objection, to competency of the testimony. *Held*, error, under the rule applied in *People v. McElvaine* and *Link v. Sheldon* (both *supra*), and that the principle is not changed by the circumstance that all the testimony embraced within the sweeping terms of the question was before the court, or that the mass of testimony upon which the opinions were based came from witnesses of the opposite party.

 Note on Hypothetical Questions.

In *People v. Murphy* (101 N. Y., 126), reported at p. 125 of this volume, a prosecution for causing an abortion, it was *held*, error to allow the physician who had attended the woman, to testify as an expert whether or not in his opinion, an abortion had taken place, it appearing that such opinion was founded not only upon what he observed of the physical condition of the woman, but upon all her statements and the history of the case as derived from her, which statements and history were inadmissible and remained undisclosed.

NOTE ON THE PROPER FOUNDATION OF HYPOTHETICAL QUESTIONS.

In the framing of hypothetical questions, counsel may assume facts as they claim them to exist, and an error in the assumption does not make the question objectionable if it is within the probable or possible range of the evidence.

Nor need such questions state facts as they exist; each side may shape questions according to its theory.

If the facts assumed are not unsupported by evidence in the case, the question cannot be excluded merely on the ground that in the opinion of the judge the facts are not established by a preponderance of evidence.

If, on direct examination, the question assume any material fact which there is no evidence to support, it must be excluded.

On cross-examination, abstract questions and hypothetical questions not founded on evidence in the case, may be put for the purpose of testing the witness, nor will such cross-examination make him the adversary's witness within the rule against contradicting one's own witness.

[*The above principles are taken from Abbott's Trial Brief on the Facts*, pp. 227-232, §§ 578-593, where the cases are collated; for the application of the rules in criminal cases, see *Abbott's Trial Brief of Criminal Cases*, §§ 582, *et seq.*, as partly modified by *People v. McElvaine*, reported *supra*.]

PEOPLE v. DRUSE. .

New York Court of Appeals, 1886.

[Reported in 103 N. Y., 655.]

After a witness for the prosecution has, without interruption, gone through the story of the incidents of a transaction, the trial judge may permit the district attorney to call his attention to particular facts without leading.

Trial of an indictment for murder.

On the trial the following controversy occurred over several questions put by the district attorney to the witnesses for the prosecution.

Frank Gates having testified generally to all the facts in the case known to him, was asked by the district attorney: "Going back to the time that you and Georgie were at the corner of the house, and when you went in, describe what you first saw when you went in the house, after Mrs. Druse called you.

Defendant's Counsel: We object to the question.

The Court: Upon what ground?

Defendant's Counsel: Upon the ground he has been all over the transaction and told it all.

The Court: I will overrule the objection. I didn't permit him as he went along to ask very much of anything, and let the boy tell his own story. Now, I will permit him to call his attention to details so far as he thinks necessary, without leading, of course.

Exception for defendant recorded.

George Druse, having testified as follows: I have heard mother tell him to go to hell: that is all I remember: yes, more than once; I don't know how many times.

Q. Did you ever hear her say she wished he was dead?

Objected to by defendant, on the ground the witness had

People v. Druse, 103 N. Y., 655.

just said he only heard this talk and that is all; he never heard anything else.

By the Court: Did you hear her call him, or say anything to him; test your own recollection; if you recollect anything else, tell us what it is?

A. I don't recollect anything else she said.

District Attorney: Now, I ask you, whether you heard her say anything, that she wished he was dead?

Defendant's Counsel: We object to that; he has been exhausted upon that subject; says he don't recollect anything.

The Court: And that being so, I think I will allow the district attorney to call his attention to it and ask him if he heard anything of that sort and if so, what it was?

Exception for defendant recorded."

At Oyer and Terminer judgment was rendered on a verdict convicting defendant of murder.

The Supreme Court at General Term affirmed the judgment.

HARDIN, P. J., in the course of his opinion, referring to the fact that after witnesses had on the trial narrated some of the conversations and had stated generally all that they remembered in respect to them, the examining counsel was permitted to direct their attention to particular facts or particular conversations and phrases used in conversation, and to interrogate them in respect to such particulars, said "We are of the opinion that the rulings are within the rule prescribed for the examination of witnesses under similar circumstances."

The Court of Appeals affirmed the judgment.

ANDREWS, J. [*on this point said*]: The court, in its discretion, properly permitted the district attorney to call the attention of the witnesses for the people, Frank Gates and George Druse, to particular facts, after they, without interruption, had gone through the story of the incidents of the eighteenth of December. We think the judge carefully guarded and protected the legal rights of the defendant in their examination.

O'Hagan v. Dillon, 76 N. Y., 170.

O'HAGAN v. DILLON.

New York Court of Appeals, 1879.

[Reported in 76 N. Y., 170.]

While a party cannot cross-examine his own witness, and is in general bound by the answers made, he may, after the witness has given an ambiguous answer, inquire (there being no objection to the question as leading) as to any circumstance or fact tending to enable him to recollect the fact sought to be proved more clearly or certainly.

An action for damages for injuries caused by the plaintiff's falling into an excavation made by defendants, it being alleged that defendants were negligent in not putting up and maintaining proper barriers and lights. A witness for the defendant having stated that he hung a lamp on the evening of the accident on the fence by the side of the excavation, was asked, when he removed it, and answered: "I expect I removed it from half past four to five in the morning." He was then asked: "Is your recollection refreshed, or your attention called to that from any circumstance—any accident that happened there?" This was objected to and excluded and an exception taken.

Judgment was entered upon a verdict for the plaintiff.

The Superior Court at General Term affirmed the judgment, saying on this point: "The general rule is that there can be no corroboration until a necessity has been shown for it by impeachment. If a witness remembers what he testifies to, that is all the party who calls him can have. The fact is before the jury that he has a recollection. Primarily the cause of his having a recollection is not material. If the other side does not, by cross-examination, show that his recollection is not positive, it is presumed to be what he impliedly states it when he answers positively. Such a question as was asked might call out immaterial and trifling matter, tending to make a confusion and irrelevant issue. But on cross-examination the witness did state the cause of his having a distinct recollection that he hung out a lamp and the defendant then

O'Hagan v. Dillon, 76 N. Y., 170.

obtained all that the excluded question (except the leading portion) could have obtained.

The Court of Appeals reversed the judgment.

PER CURIAM [*after consideration of another point*]: We think that the question should have been allowed. It was not objected to as leading. While a party cannot cross-examine his own witness, and is in general bound by the answers made, it is not objectionable, after the witness has given an ambiguous answer, to inquire as to any circumstance or fact tending to enable him to recollect the fact sought to be proved more clearly or certainly.

It is suggested that the cross-examination elicited all the facts from this witness, but that examination related to the hanging of the lamp in the evening, and not to its removal in the morning, which was material as tending to show whether it remained through the night, and thus afforded light to see the excavation.

Judgment reversed and a new trial ordered.

All concur, except ANDREWS and MILLER, JJ., dissenting.

NOTE.—In *Tozer v. N. Y. Central & H. R. R. Co.*, 17 N. Y. Weekly Dig., 370, an action for killing plaintiff's infant son, by a locomotive running backward at high speed without proper warning, and no light upon the locomotive, a witness having testified that she had observed the pusher, before and after the accident, with respect to a light upon it, was directed to state what she knew about the question "whether there was a light on the rear of the engine that night," and answered, "I don't know whether I did or not; I wouldn't take my oath I did."

After testifying that she saw that engine the morning before the accident, she was asked, "Did you after that accident observe any change in the appearance of the engine?" This was objected to, the objection overruled, and the witness allowed to answer, "Yes, sir, I saw them strike a light on it the first time that day, the light on the hind end of the engine; there might have been a head light there that hadn't been lit. I wouldn't swear there was not, but I never saw it."

Held, that as she had not sworn positively as to whether there was a light on the pusher or not on the night of the accident, and had given indefinite answers to questions leading up to her recollection, the question was proper to enable plaintiff to ascertain exactly what her recollection was as to the night in question on the subject of a light. How it was on other occasions was unimportant, but the reference to the other occasions was apparently with an honest effort to develop her memory of the night when the accident occurred.

Acerro v. Petroni, 1 Stark., 100.

ACERRO v. PETRONI.

King's Bench and Common Pleas, 1815.

[Reported in 1 Starkie (2 E. C. L. R.), 100.]

When a witness, called to prove the partnership of plaintiffs, could not recollect their names, but stated that he thought he could recognize them if suggested to him,—*held*, not objectionable for plaintiff's counsel to ask the witness whether specified persons were members of the firm.

It is not sufficient to prove the several surnames, without proving also the Christian names of the members of the firm, as specified in the declaration.

Assumpsit by the plaintiffs, bankers, at Paris, upon an account stated by the defendant.

The witness called to prove the partnership of the plaintiffs, could not recollect the names of the component members of the firm, so as to repeat them without suggestion, but said he might possibly recognize them if suggested to him.

Lord Ellenborough, alluding to a case tried before Lord Mansfield in which the witness had been allowed to read a written list of names, ruled that there was no objection to asking the witness, whether certain specified persons were members of the firm.

The witness recollected the surnames, but not the Christian names of those mentioned, as members of the firm, and their Christian names being specified in the declaration in the count upon the account stated, and the terms of the acknowledgment being generally to Acerro and Co., the plaintiffs were non-suited.

NOTES OF RECENT CASES ON QUESTIONS TO REFRESH WITNESS' MEMORY.

Alabama: White v. State, 87 Ala., 24; s. c. 5 Southern Rep., 829 (it is error not to permit a party to ask his own witness, for the purpose of refreshing his memory, or of showing that the party has been put to a disadvantage by unexpected evidence,—whether he had not at some other time made statements inconsistent with his testimony, even though the admission of such inconsistency would injuriously affect the witness'

 Note on Questions to Refresh.

credibility); s. p. Louisville, etc., R. Co. v. Hurt, Ala., 1893, 13 Southern Rep., 130. *Indiana*: Stanley v. Stanley, 112 Ind., 143; s. c. 13 Northeast. Rep., 261 (a party may call his own witness' attention to his testimony on a former hearing in order to refresh his memory); s. p. Ehrisman v. Scott, 5 Ind. App., 596. *Iowa*: State v. Cummins, 76 Iowa, 133; s. c. 40 Northwest. Rep., 124 (it is not error to allow a witness to be asked on direct examination, in order to refresh his memory, if he has not testified at another time to facts which are in conflict with his present testimony). *Massachusetts*: Commonwealth v. Brown, 150 Mass., 330; s. c. 23 Northeast. Rep., 49 (where a witness for the commonwealth upon the trial of an indictment testifies that he does not remember an admission of guilt made by the defendant in his presence, he may be asked, as preliminary to further inquiries, if he did not make a statement in respect to it upon his examination before the committing magistrate). *Michigan*: Pickard v. Bryant, 92 Mich., 430; s. c. 52 Northwest. Rep., 788 (it is error not to allow the stenographer's notes of a witness' testimony on a former trial to be read by the party calling the witness, to refresh his memory, though the counsel, when he first asked to have them read, announced that it was for the purpose of impeaching the witness, and only after such request was denied, asked to have them read to refresh the witness' memory). *Pren-tis v. Bates*, 88 Mich., 567; s. c. 50 Northwest. Rep., 637 (where, on cross-examination, a witness, who testified as to the mental unsoundness of a testatrix, could not remember whether testatrix had attended a banquet at her house, it was *held*, error not to allow the cross-examining counsel to seek to refresh the witness' memory by questioning her in relation to certain facts connected with the banquet). *New York*: People v. Kelly, 113 N. Y., 647; s. c. 21 Northeast. Rep., 122 (where a witness for the prosecution upon a trial for murder showed a disposition to favor the prisoner, it was *held*, not error to allow the district attorney, for the purpose of refreshing the witness' memory, to ask him if he had not previously testified to certain contradictory facts specified); s. p. People v. Sherman, 133 N. Y., 349; s. c. 31 Northeast. Rep., 107.

Ruch v. Rock Island, 97 U. S.. 693.

RUCH v. ROCK ISLAND.

United States Supreme Court, 1878.

[Reported in 97 U. S., 693.]

A witness, called to prove what a witness, since deceased, testified to on a former trial, may state the substance of the testimony given, although not able to give the exact language.

He may use his own notes taken at the former trial to refresh his memory.

An action of ejectment.

Upon the first trial a verdict was entered for the defendant. This verdict was set aside and new trial ordered.

A second trial also resulted in favor of the defendant, and judgment was entered accordingly. Between the two trials the great Chicago fire had occurred, and all the papers filed in the case were destroyed. Among them were a deposition of Henry Powers and a deposition of Hibbard Moore. At the time of the second trial both deponents were dead. The depositions of Connelly and Harson were offered to prove the contents of the depositions which had been burned. Connelly deposed that he was the counsel for the defendant at the first trial, and that he put the interrogatories to Powers when his deposition was taken. He then proceeded "to give the substance of the testimony of said Powers as given in his (Powers') deposition, he, Connelly, refreshing his recollection by notes taken," as witness said, "by him at that time." He said he gave "the main and principal points of the deposition of the deceased witness, but could not give the exact language." He also said he gave "the main and principal points of the cross-examination and re-examination of said Powers, as given when said Powers' deposition was taken." Harson deposed that he was the commissioner who took the deposition of Powers and the deposition of Moore; that he remembered the substance of the testimony of each of those witnesses but was not able to give the exact language of either. He then made a statement of the testimony of each as given when his deposition was taken. To the admission of all this testimony of Connelly and Harson the counsel for the plaintiff in error objected. It was received, and he excepted.

Ruch v. Rock Island, 97 U. S., 693.

The United States Supreme Court affirmed the judgment.

SWAYNE, J. [*after stating the facts*]: There was no error in admitting the testimony. The precise language of the deceased witnesses was not necessary to be proved. To hold otherwise would, in most instances, exclude this class of secondary evidence and in so far defeat the ends of justice. Where a stenographer has not been employed, it can rarely happen that anyone can testify to more than the substance of what was testified by the deceased, especially if the examination was protracted, embraced several topics, and was followed by a searching cross-examination. It has been well said that if a witness in such case, from mere memory, professes to be able to give the exact language, it is a reason for doubting his good faith and veracity. Usually there is some one present who can give clearly the substance, and that is all the law demands. To require more would, in effect, abrogate the rule that lets in the reproduction of the testimony of a deceased witness. The uncertainty of human life renders the rule, as we have defined it, not unfrequently of great value in the administration of justice. The right to cross-examine the witness when he testifies shuts out the danger of any serious evil, and those whose duty it is to weigh and apply the evidence will always have due regard to the circumstances under which it comes before them, and rarely overestimate its probative force. (1 Greenl. Evid., § 165, and notes.)

The living witness may use his notes taken contemporaneously with the testimony to be proved, in order to refresh his recollection, and, thus aided, he may testify to what he remembers; or if he can testify positively to the accuracy of his notes, they may be put in evidence. (*Id.*, § 166, and notes.)

The bill of exceptions discloses nothing wrong in the use of his notes made by Connelly.

Houstine v. O'Donnell, 5 Hun, 472.

HOUSTINE v. O'DONNELL.

New York Supreme Court, 1875.

[Reported in 5 Hun, 472.]

A memorandum or statement prepared by the witness a long time after the transaction—in this case, three years,—cannot be used to refresh his memory by the party who called him, especially where the statement is purely negative.

Judgment was entered for the plaintiff upon report of a *Referee*.

The Supreme Court at General Term affirmed the judgment.

GILBERT, J. [*saying on the point*]: With respect to the affidavit of November 28th, 1874, we are of the opinion that it in no sense belongs to the class of documents or memoranda which the law always permits, and sometimes requires, to be shown to a witness for the purpose of refreshing his recollection. It was not made contemporaneously with the transactions mentioned in it, but three years afterward. It is not a record or note of any fact or occurrence, but contains a mere statement that the disputed fact did not occur. Such a paper when put before a witness by the party who calls him, can have no proper effect in refreshing his memory, and would be calculated to stimulate his courage, rather than his veracity. We think the practice of procuring such papers, and then using them ostensibly for the purpose of refreshing the recollection of a witness who appears to be adverse, but really to intimidate him, ought not to be encouraged or sanctioned. The proper course is to examine the witness in the usual way, and, if his testimony be in contradiction of written statements previously made by him, to interrogate him respecting the latter, for the purpose of probing his recollection, and of obtaining an explanation of his inconsistency. (*Bullard v. Pearsall*, 53 N. Y., 230.)

Carter v. Bowe, 41 Hun, 516.

CARTER v. BOWE.

New York Supreme Court, 1886.

[Reported in 41 Hun, 516.]

It is *error* not to allow a witness to look upon a memorandum produced to refresh his memory, on the ground that the memorandum has not been identified. *

Whatever the memorandum may contain, if it would refresh the recollection of the witness as to the facts in issue, the party has the right to have that memorandum consulted by him, and to the testimony he may be able to give after referring to it.

Plaintiff sued the sheriff to recover the value of goods seized and sold by him on an execution against Wellington A. Carter. Plaintiff claimed title by virtue of a mortgage from said Carter and another.

Upon the trial, Wellington A. Carter was called as a witness for the plaintiff and was asked by plaintiff's counsel to look at an invoice of goods and see if those goods were in the store. The witness replied that he knew those articles were in the store.

In response to questions put by defendant's counsel and the court, the witness stated he did not make the memorandum himself, and could not say whether he had ever seen it before.

“By the Court: Q. You do not know of your own knowledge whether it is a correct or true memorandum?”

A. I know this much, that the gentleman had the goods there in the store.

*This case is to be regarded with some caution because there are many authorities to the effect that a memorandum to refresh must be identified, and shown to be in some sense at least correct to the knowledge of the witness. Compare on this point *Com. v. Ford*, 130 Mass., 64.

But another principle allows leading questions to be put to a witness whose memory fails at the point, and it is upon this principle that if a witness cannot recall a name, counsel may be permitted by the judge to suggest several names asking the witness if it was any of those (see *Acerro v. Petroni*, p. 393), just as for the purpose of identifying a person, several others may be brought in with him, leaving the witness to pick out the one identified.

Upon general principles there could be no necessary impropriety in handing the witness in the principal case any printed catalogue of a drug house, without any evidence of its correctness, and allowing him to make as complete a statement of the items relevant to the cause by running his eye over such a catalogue *raisonnée* of all the goods in the trade. The objection to such a course if any would rest not on the danger of the use of such a memorandum to refresh, but on taking the time of the court to supply the want of preparation which ought to have been made before trial.

It is clear that *counsel* had a right to use the memorandum in interrogating the witness, subject of course to whatever objection there might be to putting leading questions.

Q. You did not see the schedule made, you do not know whether it is accurate or inaccurate?

A. When he sent the goods there, I must have seen the receipt or the memorandum, or something of the kind.

The Court: I exclude the memorandum on the ground that it appears from the testimony of the witness that he does not know anything about the correctness of it, and that the goods therein specified were in the store.

Plaintiff excepted."

After further questioning by plaintiff's counsel for the purpose of showing what goods the witness recollected were in the store, during which the counsel was not allowed even to use the paper himself, to ask questions from it, on the ground that it was not identified and could not be used, plaintiff's counsel asked:

"Q. State anything else that you remember?

A. If I knew what was in the invoice I would probably call it to mind.

Q. You did not make the invoice?

A. No, sir; but if I had the names of the things I could remember whether they were there or not, by looking over the invoice; but to remember them is pretty hard work just at the moment; so many things else to remember at the same time.

By Plaintiff's Counsel: Q. Do you think upon looking at the memorandum, you might refresh your memory, so that you could state the articles that were left there by Mr. Aymar?

Defendant's counsel objects that the memorandum has not been identified. Objection sustained and exception taken."

At Circuit judgment was entered for defendant on a verdict.

The General Term of the Supreme Court reversed the judgment.

DANIELS, J. [*on this point, said*]: Among these was the ruling sustaining the objection that the witness, Wellington A. Carter, could not look upon a memorandum produced upon the trial to refresh his memory, so that he could state the articles which had been left in one of the stores by Mr. Aymar, who was one of the plaintiff's assignors. Liberty was refused the

Barker v. The New York Central Railroad Company, 24 N. Y., 599.

witness to answer this question, on the ground that the memorandum had not been identified. But that objection was not well taken, for whatever the memorandum may have been, if it would refresh the recollection of the witness so that he could state the articles which were left, the plaintiff had the right to have that memorandum consulted by him, and to the testimony he might be able to give after referring to it.

The object of the inspection or examination of the memorandum was to revive the memory of the witness, and whatever it may have been, if it would have been attended with that effect, and the plaintiff was entitled to an opportunity to prove that it would, the witness had the right to look at it. (*Doe ex dem. Church v. Perkins*, 3 Durn. & East., 749; *Bigelow v. Hall*, 91 N. Y., 145; *Marcy v. Shults*, 29 *id.*, 346.)

BARKER v. THE NEW YORK CENTRAL RAILROAD COMPANY.

New York Court of Appeals, 1862.

[Reported in 24 N. Y., 599.]

Upon a question as to the time when a railroad train arrived at a certain station on a particular day, it is competent to discredit the testimony of plaintiff's intestate given on a former trial, and to corroborate the conductor's testimony, by proving that, on the day in question, the latter made a memorandum of the time of arriving, pursuant to regulations of the company; and also by proving the time-table and other rules governing the arrival and departure of trains.*

Action for damages sustained by one Page, by being put off from defendant's train. The present plaintiff was Page's administrator and substituted on Page's death.

Upon the trial William T. Rudd, the conductor of the train, was called by defendant and testified as to the two branches of the road that diverge from Syracuse and then said: "My train arrived at Syracuse at 11.55; I am able to state it from a note of it made by me at the time; the entry was made as I entered the depot."

Here the witness was asked in relation to, and to state what

* For the admissibility of a "train sheet," see a recent case in 158 Mass., 450.

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were, the regulations of the company in regard to time-bill and entering the time of the arrival and departure of the trains.

Plaintiff's counsel objected to the reception of such evidence; objection overruled, and exception taken.

The witness proceeded: "The established regulations of the company are, to put down times of arrival and leaving; I hand it over to the conductor who takes the train from me, and it is sent to the general ticket office; we regulate by Albany time; the railroad clocks are regulated by Albany time; there are railroad clocks at Utica, Syracuse, and Rochester; I timed the arrival of the train by my watch, and handed it to Mr. Chapman, the next conductor; that train never stopped to dine at Syracuse, to my recollection, but the 7.30 train did. The time for my train to arrive at and leave Syracuse was 12 M."

On cross-examination Rudd testified: "I fix the time of arrival at Syracuse from my notes made at the time; have no distinct recollection of the time that day independent of my notes."

The memorandum was not offered in evidence. It does not appear from the record in the appeal book whether the memorandum was produced or used by the witness on the trial.

On direct examination Rudd was asked to state the regulations of the company, prescribed for his brakemen, and their custom in regard to announcing change of cars at Syracuse.

Plaintiff's counsel objected; objection overruled, and exception taken.

The witness answered: "My brakemen made an announcement at Syracuse at my direction; my instructions are for them to announce that passengers for the new road by way of Clyde, Lyons, &c., must change cars."

Brakeman Hughes testified on direct, as to the regulation to announce the change of cars: "I always carried it out; I never failed to do my duty; I have no distinct recollection of the 8th day of October more than any other day."

Brakeman Cotter testified that he always made announcements at Syracuse; that he could not say he did it on the day in question; but from his usual custom, he was satisfied he did it on that day."

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Brakeman Richards subsequently testified on cross-examination that, "when the train was in the depot at Syracuse, I went to every car and made the announcement."

At Circuit, judgment was entered for defendant.

The General Term of the Superior Court affirmed the judgment.

The Court of Appeals affirmed the judgment.

SUTHERLAND, J. [*passing on exceptions to admissions of evidence, said*]: The first exception was to the allowance of the evidence of Budd, the conductor on the train from Albany to Syracuse, in answer to a question asked him as to the regulations of the defendant in regard to the time-bill, or time-table, and entering the time of the arrival and departure of trains. His evidence in answer to this question was, in substance, that it was a regulation of the defendant that the time of the arrival and departure of a train should be noted down; that he accordingly noted down the time of the arrival of the train at Syracuse and handed it to the conductor who took the train from him there, that the railroad time and the railroad clocks at Utica, Syracuse, etc., were regulated by the Albany time; that the 6.30 o'clock train never stopped to dine at Syracuse, but the 7.30 o'clock train; that the time for the 6.30 o'clock train to arrive and leave Syracuse was 12 o'clock, noon.

This evidence was, perhaps, not very material; but as Page had testified that the train in which he was passenger arrived at Syracuse about a quarter to 12, and that notice was given that it stopped twenty minutes for dinner, and that it left there a few minutes past 12, and as Budd had previously testified that the train arrived at 11.55 A. M. precisely, I think the evidence was competent and proper.

The object of the evidence was, no doubt, to discredit Page by supporting or corroborating Budd.

It was certainly competent, with that view, to prove the fact that Budd made a memorandum of the time of the arrival of the train and handed it to the next conductor; and as to the evidence as to the regulations, etc., as Budd had contradicted

Page as to the time of the arrival of the train, this evidence would tend to corroborate Budd upon the principle that the business of the defendant is a sort of public business and their employees a kind of public officers; and that the presumption is that they would perform their duties according to the regulations of the business. (1 Greenl. Ev., 40.)

Upon the same principle, I think, the exceptions to the allowance of the evidence of Budd, Hughes and Cotter, as to the regulations of the company and the custom of brakemen as to giving notice to passengers to change cars, were not well taken.

It was a material question in the case whether such notice was given to Page or not. That was a disputed question. Page had sworn that he heard no notice. The object of the evidence as to regulations and custom was to show that the customary notice was given on this occasion according to the regulations.

It was not the object of the evidence to show what was done on other occasions, but what was done on this.

The evidence may not have been very material in this case, for Richards subsequently testified positively that he did give the notice, in a certain manner which he described, on the arrival of the train at Syracuse, but the evidence was competent (the order of proof not being material) to corroborate Richards, and as tending to show notice independent of his evidence.

DOYLE v. EYE AND EAR INFIRMARY.

New York Court of Appeals, 1880.

[Reported in 80 N. Y., 631.]

It is not error to allow a witness to look at a memorandum proper to refresh his memory, merely because it has not been shown that his recollection was not clear without it.

Plaintiff sued to recover for injury to his eyes, claiming it had been caused by the malpractice of the defendants, The New York Eye and Ear Infirmary, and one Derby, one of its assistant surgeons.

Upon the trial the defendant Derby testified on direct:

Peck v. Lake, 3 Lans., 136.

"I have heard the testimony as to my interview with young Doyle and his father in 1872; I remember his case.

(Witness is shown a paper.)

Q. What is that paper?

A. This paper is a diagnosis of a patient, James Ferguson. Doyle gave his name as James Ferguson. His treatment began January 19th, 1872. There are certain words upon that paper giving the name of the disease, and some other points, and a prescription in my own handwriting. I made that writing January 19th, 1872.

Q. When did you make that handwriting?

A. January 19th, 1872, at the first examination of Doyle.

Q. Will you state, referring to that paper to refresh your memory, what was the first thing you did to Doyle?

Objected to by plaintiff's counsel as irrelevant and incompetent, it not appearing that witness' recollection is not clear and distinct. Objection overruled; exception taken."

At Circuit, defendant had a verdict.

The General Term of the Supreme Court affirmed the judgment without opinion.

The Court of Appeals affirmed it.

PECK v. LAKE.

New York Supreme Court, 1870.

[Reported in 3 Lans., 136.]

Where a witness makes his answers from consulting a written memorandum on the stand, the opposite party may inspect the paper and examine concerning it, without putting the paper in evidence.

If the court refuse to compel submitting the paper to the inspection of counsel it should strike out the testimony which depends entirely on the memorandum.

Plaintiff sued for compensation for services as the defendant's clerk, rendered for one year without specific agreement on salary, and for nearly another year on fixed salary.

The defendant claimed an agreement on \$150 for the first year, and that he had credited the plaintiff with that sum in his ledger, to which the plaintiff had access, he being the principal

book-keeper. One of the questions litigated was when the entry was made; and when it was brought to the plaintiff's knowledge and whether he had acquiesced in it. There was also a controversy as to an item of charge against the plaintiff of ten dollars, in defendant's handwriting in the cashbook under date of October 3d, 1868, and which had not been carried to the ledger.

While on the stand, the plaintiff stated among other things, that the defendant had paid him \$554.94. On cross-examination as to the amounts paid him, he read from a memorandum book as to the amounts paid, and denied payment to him of certain sums asked about by defendant's counsel. At a subsequent stage of the cross-examination he said: "I made the account which I have in my book and which I have read from, in December, 1868 or in January, 1869. I had it on another book and copied it on this. The items that accrued after January, 1869, I put on as they accrued from day to day. I destroyed the other memorandum which was on bill paper." On redirect examination he said: "This memorandum was taken from the ledger. It is a true copy of that ledger. I first handed Share this book, and I read from the ledger to him first, and then we changed books, and I think he read from the ledger and I from this book. "I have received goods and merchandise, amounting to \$29.85, of defendant, and \$554.94 in all. In cash, \$525.08.

On further cross-examination, he said: "I will not produce the book from which I refreshed my recollection yesterday about payments. It was not an accurate memorandum of every item of my account upon Mr. Lake's books. There was one item there not transcribed by me; that item was a credit to me of \$150 for one year's labor."

Being recalled on his own behalf, he testified concerning entry in the ledger of the \$150 credit, and stated that he had opened a new ledger when he first discovered that credit; and on being cross-examined, he said: "I have my memorandum book with me, from which I read credits to defendant and answered defendant's questions. I will not produce it unless I am obliged to do so."

The referee was then asked by the defendant to compel the witness to produce the book, and declined on account of a want of power, the defendant excepting.

Peck v. Lake, 3 Lans., 136.

The plaintiff being afterward recalled on his own behalf and further cross-examined, said: "In figuring up the amount I received for the first year, both in cash and merchandise, I refreshed my recollection from my memorandum book. I could not have remembered the amounts without reference to my memorandum book. Neither could I have remembered the dates of the items. I did not make the entries of the items on this book at the dates they occurred. I have the book with me now.

I will not produce the book and let you see it. I footed up these items while on the stand as a witness, after the question was asked me as to amount I received the first year."

The referee was then asked by the defendant to require the witness to produce the book referred to, for the inspection of defendant and his counsel, and again declined on the ground of a want of power, the defendant excepting.

The defendant then asked the referee that all the plaintiff's evidence be stricken out, and again that the evidence in reference to the amount of cash and merchandise taken from his memorandum book be stricken out, on account of plaintiff's refusal to produce the book for defendant's inspection. The motion was denied both as to all the evidence and as to a part, on the ground of want of power.

Judgment was entered upon a report of the referee in plaintiff's favor.

The General Term of the Supreme Court reversed the judgment.

TALCOTT, J. [*after stating the facts*]: I have no doubt the defendant's counsel was entitled to inspect this memorandum and to cross-examine from it. Phillips states the rule to be, that where the memory of a witness has been revived by a previous inspection of a memorandum, it is not absolutely necessary to the admission of the testimony that the memorandum shall be produced in court; but if produced, the opposite party has a right to see it and cross-examine from it. (2 Phil. Ev., 4 Am. ed., 917.) This is where the witness is able to testify to the fact absolutely after having his memory revived, and the testi-

mony itself is entirely independent of the memorandum. There are other cases where the memorandum itself is made evidence to a certain extent, as in the familiar case of proving the testimony of a witness on a former trial, where the party who took the minutes has no present recollection even after inspection of the minutes as to what the testimony was, but is able to swear he took it accurately at the time. Here the minutes in connection with the testimony are made the evidence, and, of course, the parties are entitled to inspect and examine from it. In this case the memorandum of the plaintiff was sought to be made in some sort evidence, without permitting the defendant to see it. At one stage of the case, the plaintiff, on direct examination, testified to its having been copied from defendant's ledger. On his last cross-examination the plaintiff said that he could not have remembered the amounts or dates of the items without his memorandum. When it is recollected that his testimony, in connection with which he had used the memorandum, consisted entirely of amounts and dates of items, it is difficult to say that this was not an attempt substantially to use the memorandum as evidence without permitting the opposite party to see it. But I have no doubt that whenever it appears that a witness is making his answers on the stand from a written statement or memorandum, it is the privilege of the party against whom the witness is introduced to inspect the paper, and to examine concerning it, and even to submit it to the jury if he sees fit. Probably it is the right of the counsel on either side to inspect any paper which is exhibited to the witness on the stand for the purpose of refreshing his memory or in any way affecting his testimony, though this is said not to be the case where a paper is exhibited to a witness for the mere purpose of proving the signature.

In Hardy's case (24 How. State Trials, 824), Eyre, C. J., said: "It is always usual and very reasonable, when a witness speaks from memorandums, that the counsel should have an opportunity of looking at those memorandums when he is cross-examining that witness."

In Sinclair v. Stephenson (1 Car. & P., 582), the court held: "If a paper be put into the hands of a witness for the purpose

of refreshing his memory, the opposite counsel has a right to see it."

Of course it can make no difference whether the paper first makes its appearance on the direct or cross-examination of the witness.

It may have been prepared in order to meet and frustrate a probable course of cross-examination.

It *Dowling v. Finigan* (1 Car. & P., 587), where it appeared that the witness had taken a memorandum of a conversation he was testifying to, and neither counsel called for it, the judge asked the witness for it after the evidence was closed, and when produced, told the defendant's counsel he might have it read to the jury or not, as he thought proper, saying that either party might have called for it.

In *Rel v. Ramsden and al.* (2 Car. & P., 603), the counsel for defendants, on cross-examination, put a paper into the hands of witness for the crown to refresh his memory as to date. The attorney-general (Sir James Scarlett) wished to look at the paper. The counsel for the prisoners submitted that the attorney-general had no right to see it unless he would put it in evidence. To this Lord Tenterden, C. J., answered: "You put the paper into the hands of the witness to refresh his memory. It is usual for the opposite counsel to see it and examine upon it. I think he has a right to see it."

Nisi prius reports in this state being rare, it would probably be difficult to find any authority in our reports on this question, for I apprehend it has been the almost invariable practice of the judge where a witness has been using a memorandum on the stand to require the witness at once to submit it to the inspection of the counsel examining or the other party, upon the request being made. I think the rule is founded in good sense. Very improper uses may be made of memoranda, to suggest, regulate or control the testimony of a witness, and the right of the counsel to inspect them furnishes some safeguard against their abuse. An artful witness will sometimes, for the purpose of adding weight to his testimony with the jury, produce a memorandum claimed by him to have been made at the time of a transaction, when an inspection of the paper will show it to

have been of more recent origin, or from the handwriting, or other circumstances, to have been fabricated with a view to the testimony.

The referee declined to require the plaintiff and witness to submit the memorandum, from which he was testifying, to the inspection of the counsel for the opposition, not because he thought it useless or improper for any reason, but on the ground of a want of power, and for the same reason refused to strike out the testimony given by the plaintiff as such witness. In this, I think, the referee erred. He, without doubt, possessed and might have exercised the same power as the court would have done under the same circumstances. The mildest form of relief against the conduct of the witness was to grant the request of the defendant, that so much of the plaintiff's testimony as depended, according to his own statement, entirely on the memorandum, should be stricken out. This was the least to which the defendant was entitled under the circumstances, and I think the referee erred in denying the motion. The memorandum, with its contents, is not before us. From the circumstances of the case, and the description given by the plaintiff of the memorandum, it is quite probable that its production would in no way have affected the result, and perhaps quite improbable that anything would have been disclosed by it, to which the plaintiff could have any serious objection, and it is to be regretted that the plaintiff should, if this is so, in the indulgence of mere captiousness, have subjected himself to the trouble and expense of a retrial of his case. He alone, however, is primarily responsible for the error which renders such a course necessary.

The judgment should be reversed and a new trial ordered, costs to abide the event.

Judgment reversed.

NOTE.—In *Tibbetts v. Sternberg*, 66 Barb., 201,—*Held*, error to refuse to compel one of plaintiff's witnesses to produce for inspection of defendant's counsel, a memorandum from which the counsel alleged the witness had been testifying, on his direct examination.

MULLIN, J., said: "It is the right of a party to inspect a memorandum used by a witness while testifying; whether he reads its contents or only uses it to refresh his recollection.

The witness has no right to use a memorandum in either way, unless

Bigelow v. Hall, 91 N. Y., 145.

made by himself; and if the witness cannot be compelled to produce it, he might use documents made for him by the party calling him, of the accuracy of which he knows nothing. Such a practice, if tolerated, would lead to the greatest abuses.

Before the witness can be required to produce a paper, however, it must appear that he is using it as or in aid of his testimony. No lawyer would claim to be entitled to an inspection of every paper the witness might have in his custody, or even in his hand, while giving evidence.

When the referee was called on to compel the production of the paper, it does not appear, except inferentially, that the witness had, or used, a memorandum, save by the allegation of counsel. The case says the defendant's counsel requested the witness to allow him to examine the memorandum used by him (the witness) in giving, on his direct examination, the amount of logs; and the plaintiff declined to comply with his request. This is a tacit admission by the witness that he had and used such a paper. No objection or suggestion was made by the plaintiff's counsel that he had no such paper; the witness did not deny it; and the referee did not ask him whether he did or did not have it; but he seemed to assume that the witness had it, and yet refused to require the witness to produce it.

This was an error, for which we must reverse this judgment. The production of the paper might have been of no value to the defendant, but it is the principle thus sought to be established that is mischievous and dangerous. The right of a party to protection against the introduction against him of false, forged or manufactured evidence, which he is not permitted to inspect, must not be invaded a hair's breadth. It is too valuable to be trifled with, or to permit the court to enter into any calculation as to how far it may be encroached upon without injury to the party.

I am of the opinion that the referee erred in not directing the witness to produce the memorandum as desired to do by the defendant's counsel. (1 Cowen & Hill's Notes, 757.)

BIGELOW v. HALL.

New York Court of Appeals, 1883.

[Reported in 91 N. Y., 145.]

A witness, who has refreshed his memory by the use of a memorandum made at the time of the transaction, as to which he is testifying, may be allowed to read items from it as his testimony, provided the memorandum itself is not introduced in evidence.

On the trial, the defendant Hall, as a witness in his own behalf, testified among other things that the consideration of the

mortgage consisted of various items, of which there was a memorandum, made at the time and place of the transaction, some of the figures of which were in his handwriting, and others in the handwriting of the plaintiff.

The memorandum was then produced, delivered to the witness and identified by him, and the following took place in regard to it:

"The counsel for the plaintiff said I object to the paper.

The Court: It is not evidence of itself, he can use it however.

Plaintiff's counsel: He can use it to refresh his recollection, I suppose.

Defendant's counsel: State how the \$3,000 was made up.

A. Here is a cash item of——

Plaintiff's counsel objected to his reading that paper.

The witness said: I merely do it to refresh my memory, to get at the items.

Plaintiff's counsel: You must swear to it independent of that paper.

The Court: If he made the memorandum and can't recollect the items without reference to the paper, he can read the paper.

Exception taken, the witness read the items from the paper."

At a Special Term of the Supreme Court, judgment was entered for defendant.

The Supreme Court at General Term affirmed the judgment.

SMITH, J. One of the settled rules in this state respecting the use of memoranda is, that a witness may, for the purpose of refreshing his memory, use any memorandum, whether made by himself or another, written or printed, and when his memory has been refreshed, he must testify to the facts of his own knowledge, the memorandum itself not being evidence. (*Howard v. McDonough*, 77 N. Y., 592). The decision excepted to, as we understand it, was not an infraction of the rule. The decision was simply to the effect that the witness might read the memorandum to refresh his recollection, the memorandum itself was not held to be in evidence.

Judgment affirmed with costs.

Bigelow v. Hall, 91 N. Y., 145.

TALCOTT, J., concurred.

The Court of Appeals affirmed the judgment.

MILLER, J. [*after stating the facts*]: It will be noticed that the judge did not hold distinctly that he could read the paper in evidence; but, construing what he said literally, it will bear the interpretation in connection with what previously transpired and particularly what was said by the witness, that he might read it himself to refresh his memory, to get at the items.

The rule is no doubt well settled in this state that a witness, for the purpose of refreshing his memory, may use any memorandum made at the time of a transaction in regard to which he is called upon to testify, whether made by himself or another, and when his memory has been refreshed, he must testify to facts of his own knowledge, the memorandum itself not being evidence. Within this rule it is not apparent that the judge erred in holding that the witness could read the items from the memorandum for the purpose of refreshing his memory; he did not say he could read it in evidence, nor was the memorandum introduced in evidence of itself, the items only were read, and there is no statement in the case that anything more was done. It is true it was stated in the case, the witness read the items; stating them, but it nowhere appears that the paper itself was introduced as an independent piece of testimony.

Under these circumstances and regarding what would ordinarily be considered as part of the proceedings of the trial, it is not clear that the memorandum itself was introduced in evidence, and if it was not, no error was committed by the judge in his rulings. It may also be observed that if the evidence of the witness went beyond the ruling of the judge, that he might read the items, and in this form the memorandum became evidence by such reading and a part of his testimony, instead of his swearing to the facts within his own knowledge, after his memory had been refreshed, such evidence was not objected to by the defendant's counsel. It is, at least, very questionable as the case stands, whether the distinct point was made as to the introduction of the memorandum as evidence. Be that as it may, however, the memorandum was made, according to the

testimony of the defendant, at the office of the plaintiff at the time of the transaction and in the presence of both the parties, and the figures were put on at the time, part of them in the handwriting of the defendant and part in the handwriting of the plaintiff.

The plaintiff swears that some of the figures are in his handwriting, but whether they were made at the time, he does not know. Taking this testimony as it stands there was evidence to show that the memorandum thus made constituted a part of the *res gestae* and hence, as the act of both parties in connection with the transaction, it was admissible on that ground.

There being no error, the judgment should be affirmed.

All concur.

Judgment affirmed.

RAUX v. BRAND.

New York Court of Appeals, 1882.

[Reported in 90 N. Y., 309.]

A defendant testified in his own behalf that he knew that articles entered in his account book were delivered to plaintiff, that the entries were made at the time of the deliveries, and that he knew them to be correct when made, but that he could not from memory tell the articles. *Held*, not error for him to state from the book the articles delivered.

Plaintiff sued to recover a balance on a mutual account.

The answer set up a general denial, the Statute of Limitations, a set-off and a counterclaim.

The reply set up the Statute of Limitations to defendant's counterclaim.

On the trial defendant was sworn as a witness and testified in his own behalf that he kept an account of the articles he let plaintiff have in a book which was produced.

He was then asked by his counsel :

“Q. Did you have any other book in which you kept an account against the plaintiff?

Objected to as immaterial and incompetent.

Raux v. Brand, 90 N. Y., 309.

Objection overruled and exception taken.

A. No; there are other accounts in that book; I put it in my book when I dealt with plaintiff; commenced in 1858 dealing with plaintiff; the account is kept in Holland Dutch; account commenced in Feb., 1858; I kept this account to Dec. 25, 1876; the entries were made at the time they bear date; I could not from my memory tell the articles I have delivered without my book of entries.

Q. Turn to the book and state what articles you delivered to Mr. Raux, if any?

Objected to as incompetent, improper, because it does not call for his recollection, and outlawed.

Objections overruled, and exception taken.

Thereupon the witness turned to the book and read therefrom as evidence.

Thereafter the defendant was asked by his counsel:

Q. Do you know that the several articles which you have stated, and which appear in this book, from which you have testified were delivered to Mr. Raux, the plaintiff?

Plaintiff's counsel objected to it as incompetent and improper, leading, and no foundation laid.

Objection overruled, and exception taken.

A. Yes, sir.

Q. At the time you made these entries in that book did you know them to be correct?

Same objections, ruling and exception, as last above.

A. Yes, sir; plaintiff and I agreed on the price of the shingles; I charged on the book the price agreed on; the note marked '2' was for \$400 cash I let plaintiff have, and I took his note."

Upon report of *referee* judgment was entered for defendant.

The Supreme Court at General Term affirmed the judgment without opinion.

The Court of Appeals affirmed the judgment.

Per Curiam. First.—We think there was no legal error in

permitting the defendant to state from his book the items of his account against the plaintiff. The book was not offered in evidence. The witness testified that he knew that the several articles which he had stated in detail, and which appeared in the book were delivered to the plaintiff, and in addition that he knew the entries when made to be correct. This was original evidence of the several items of the account. The witness assumed to speak from actual recollection, using the books to refresh his memory. The questions put to the defendant were leading but an objection on that ground is not available in this court.

Second.—The point made that the cash items appearing in the account were not proved, because the question put to the defendant called for a statement of the articles delivered, and did not refer to the cash items, rests upon a hypercritical construction of the question. The question was understood to relate to the entire account of the witness with the plaintiff, including cash items as well as others. Neither the attention of the witness nor of the referee, was called to any distinction between them. The witness answered the question on the assumption that the question called for the entire account. The plaintiff cannot now be heard to object that the question related only to shingles, produce, etc., included in the account and not to cash.

HOWARD v. McDONOUGH.

New York Court of Appeals, 1879.

[Reported in 77 N. Y., 592.]

In an action for the conversion of many items of property a witness may make a list of all the items, and their values, and may aid his memory by it while testifying; but he must be able to state that all the articles named in the list were seized, and that they were of the values therein stated, and he may use the list to enable him to state the items.

After he has thus testified, the memorandum which he has used may be put in evidence, not as proving anything of itself, but as a detailed statement of the items testified to by the witness.

It seems, it is in the discretion of the trial judge in such a case to allow the witness to testify quite generally as to the items and their values,

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and receive the memorandum as the detailed result of his examination, leaving to the adverse party a more minute cross-examination.

Action for taking and converting of the contents of a printing office.

Upon the trial, Rowland M. Stover, a witness for plaintiff testified on direct examination that he was the manager of the business; and from the schedule of items of goods, filling nine pages, annexed to the complaint he testified to the value of each item referring to and reading from the schedule.

The schedule itself was then offered in evidence and received.

In the Court of Common Pleas judgment was entered upon a verdict for the plaintiff.

The Supreme Court at General Term affirmed the judgment.

DALY, J. This schedule was not admitted to prove the items apart from the testimony of the witness.

The witness swore that each and every article in the schedule, were in plaintiff's store when the marshal took possession of the property, and where such items have each been distinctly proved, the schedule is receivable in evidence to show what was in the establishment when its contents were seized.

[Distinguishing *Halsey v. Smeebaugh*, 15 N. Y., 485; *McCormick v. Penn. R. R. Co.*, 49 N. Y., 315.]

The Court of Appeals affirmed the judgment.

EARL, J. [*on this point*]: The law as to the use of memoranda by witnesses while testifying is quite well settled in this state. 1. A witness may, for the purpose of refreshing his memory, use any memorandum, whether made by himself or another, written or printed, and when his memory has thus been refreshed, he must testify to facts of his own knowledge, the memorandum itself not being evidence. 2. When a witness has so far forgotten the facts that he cannot recall them even after looking at the memorandum of them, and he testifies that he once knew them and made a memorandum of them at the time or soon after they transpired, which he intended to make correctly, and which he believes to be correct, such memorandum in his own

handwriting may be received as evidence of the facts therein contained, although the witness has no present recollection of them. 3. Memoranda may be used in other cases which do not precisely come under either of the foregoing heads. A store of goods is wrongfully seized, and an action is brought to recover for the conversion. There are thousands of items. No witness could carry in his mind all the items and the values to be attached to them. In such a case, a witness may make a list of all the items and their values, and he may aid his memory, while testifying, by such list. He must be able to state that all the articles named in the list were seized, and that they were of the value therein stated, and he may use the list to enable him to state the items. After the witness has testified, the memorandum which he has used may be put in evidence, not as proving anything of itself, but as a detailed statement of the items testified to by the witness. The manner in which the memorandum, in such a case, may be used is very much in the discretion of the trial judge. He may require the witness to testify to each item separately, and have his evidence recorded in the minutes of the trial, and then the introduction of the memorandum will not be important; or he may allow the witness to testify quite generally to the items and their values; and receive the memorandum as the detailed result of his examination, leaving to the adverse party a more minute cross-examination. Without the use of the memorandum in such cases, it would be difficult, if not impossible, to conduct a trial involving the examination of a large number of items. (*Driggs v. Smith*, 36 N. Y. Superior Ct., 283, affirmed in this court; *McCormick v. Penn. Central R. R. Co.*, 49 N. Y., 303.)

All the Judges concurred.

Judgment affirmed.

 Note on Memoranda to Refresh.

 NOTES OF CASES ON USE OF MEMORANDA TO
REFRESH MEMORY.

For recent cases on use by witness, for purpose of refreshing his memory, of Own Memoranda; of Memoranda made by Others; of Copies of Memoranda; of Memoranda as to Numerous Facts or Items; and Cross-examination as to Memoranda, see the following:

 I. *Witness' own memoranda to refresh his recollection:*

Alabama: Howell v. Bowman, Ala., 1892, 10 Southern Rep., 640 (it is error to permit a witness to refresh his memory from a memorandum made before trial, but long after the occurrence to which it refers). *California*: Morris v. Lachman, 68 Cal., 109 (a witness will not be allowed to refresh his memory from his own *ex parte* affidavit unless it is first shown that it was written by the witness, or under his direction, at a time when the facts were fresh in his memory). Watrous v. Cunningham, 71 *id.*, 30; s. c., 11 Pacific Rep., 811 (it is not error to allow a shorthand reporter as a witness to refresh his memory by reading his own notes). *Colorado*: Rohrig v. Pearson, 15 Colo., 127; s. c. 24 Pacific Rep., 1083 (a witness, who at the time of sale personally made entries in books in reference thereto, may refresh his memory from such entries). *Iowa*: Riordan v. Guggerty, 74 Iowa, 688; s. c. 39 Northwest. Rep., 107 (it is not error to permit a witness to refer to a stub check book, where he is instructed by the court that he cannot testify from the book, but can only use it to refresh his memory). *Kansas*: State v. Baldwin, 36 Kan., 1 (it is not error not to permit a witness to refer to a memorandum where he is able to testify independently thereof). Sanders v. Wakefield, 41 Kan., 11; s. c. 20 Pacific Rep., 518 (a witness may refer to a memorandum to refresh his memory which he made or was concerned in making, at the time of the occurrence to which it refers, took place). *Massachusetts*: Commonwealth v. Clancy, 154 Mass., 128; s. c. 27 Northeast. Rep., 1001 (a witness may refresh his memory from his own memorandum made at the time of the occurrence). *Michigan*: Skeels v. Starrett, 57 Mich., 350; s. c. 24 Northwest. Rep., 98 (a scale of logs made by a witness can be used by him to aid his memory). Hinchman v. Weeks, 85 Mich., 535; s. c. 48 Northwest. Rep., 790 (it is not error to permit a witness to aid his recollection of another's statements with a memorandum thereof, taken down at the time they were made, though the memorandum was not signed or read by the person who made the statements). *Missouri*: Ahern v. Boyce, 26 Mo. App., 558 (a witness may use a memorandum to refresh his memory as to the measurements of work done, though the measurements were made long after the work was completed). Abel v. Strimple, 31 *id.*, 86 (a witness may refresh his recollection from a memorandum, though he had no independent recollection of the facts stated in it, if he recollects that he saw the memorandum before, and knows that the contents are true). *Nebraska*: Weston v. Brown, 30 Neb., 609; s. c. 46 Northwest. Rep., 826

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(a witness may use a memorandum to refresh his memory, if it was made at the time of the occurrence). *Small v. Poffenbarger*, 32 Neb., 234; s. c. 49 Northwest. Rep., 337 (it is not error to allow a witness, who has taken shorthand notes upon a former trial to refresh her memory therefrom, where she states that without the notes she cannot remember the testimony to which they refer). *Schuyler v. Bollong*, 24 Neb., 825; s. c. 40 Northwest. Rep., 413 (it is improper to permit a witness to refresh his memory from a memorandum made up by a party's attorney from other evidence several months after the occurrence; but its use is not prejudicial error where it appears that the witness in fact testified from his own memory). *New Hampshire: Converse v. Hobbs*, 64 N. H., 42; s. c. 2 Northeast. Rep., 857 (a witness allowed to refresh his memory from a private cash book). *New York: Whitney v. Camman*, 45 State Rep., 570; s. c. 18 N. Y. Supp., 200 (witness may refresh his memory from a memorandum made at the time of the occurrence, which he knows to have been true when made). *Grossman v. Walters*, 33 State Rep., 921; s. c. 11 N. Y. Supp., 471 (a witness' examination upon supplementary proceedings may be used by him to refresh his recollection as to what he swore to). *United States: United States v. Cross*, D. C., 1892, 20 Wash. L. Rep., 90 (a witness can only have his memory refreshed as to what he testified upon a former occasion by reference to some record or memorandum, and not by having his former testimony repeated to him). See also as to general rule: *McClaskey v. Barr*, U. S. Cir. Ct., S. D., Ohio W. D., 1891, 45 Fed. Rep., 151; *Kingory v. United States*, U. S. Cir. Ct., W. D. La., 1891, 44 *id.*, 669. *Wisconsin: A. C. Conn Co. v. Little Suamico Lumber, etc. Co.*, 74 Wis., 652; s. c., 43 Northwest. Rep., 660.

II. *Memoranda made by others to refresh witness' memory:*

Alabama: Billingslea v. State, 85 Ala., 323; s. c. 5 Southern Rep., 137 (it is not error to allow a witness to refresh his memory as to the date of the alleged crime from his own testimony before the grand jury which has been reduced to writing and signed by him, though independent of such testimony he has no recollection of the date). *Connecticut: 7 New Eng. Rep.*, 94 (a witness may refresh his memory from a memorandum made at his dictation where he testifies from his memory so refreshed). *Minnesota: Culver v. Scott & W. Lumber Co.*, 1893, 55 Northwest. Rep., 552 (a memorandum used by a witness to refresh his memory need not have been made by himself, if after inspecting it he can testify from his own recollection). *Eder v. Reilly*, 48 Minn., 437; s. c. 51 Northwest. Rep., 226 (it is error to allow a witness to refer to a writing, which is not shown to be correct, for the purpose of refreshing his memory). *Missouri: Taussig v. Schields*, 26 Mo. App., 318 (it is sufficient if the witness knows that the memorandum used by him to refresh his memory was correct when made, though he did not make it himself). *Nebraska: Labaree v. Klosterman*, 33 Neb., 150; s. c. 49 Northwest. Rep., 1102 (it is not error to allow a witness to refresh his memory from a memorandum made by another at or near the time of the transaction, where after seeing

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it the witness can testify from his own recollection). *New York*: *Steubing v. N. Y. El. R. Co.*, 19 N. Y. Supp., 313 (where a witness after looking at book entries made by another, can testify from his own memory independent of the entries as to the transaction to which they relate, he may be allowed to do so and it is not necessary to call the person, who made the entries as a witness). *Lamberty v. Roberts*, 31 N. Y. State Rep., 148; s. c. 9 N. Y. Supp., 607 (in an action for services it is not error to permit a witness to refresh his memory from a time-book kept by another where the witness had given the time-slips to the bookkeeper from which the entries were made, and had afterwards compared the entries with the slips). *Bateman v. N. Y. Central, etc. R. Co.*, 47 Hun, 429; s. c. 14 N. Y. State Rep., 454 (the witness and C. made measurements together, C. entering them upon a memorandum which the witness signed. The witness testified that he knew the memorandum was true, when he signed it, but without it he could not state what the measurements were; and that his recollection was not refreshed by looking at the figures. *Held*, that the witness could look at the paper and state what the figures were). *Oregon*: *State v. Moran*, 15 Oreg., 262; s. c. 14 Pacific Rep., 419 (it is not error to allow a witness to testify, who has refreshed his memory before going on the stand by reading a narrative of the facts written by another; such fact affects his credibility, not his competency). *Texas*: *Sisk v. State*, 28 Tex. App., 432; s. c. 13 Southwest. Rep., 647 (on a trial for perjury committed before a grand jury, it is not error to permit the foreman of the grand jury to read the indictment in order to refresh his memory as to defendant's statements). *United States*: *Flint v. Kennedy*, U. S. Cir. Ct., S. D. N. Y., 1888, 33 Fed. Rep., 820 (a witness, who has obtained knowledge of the correctness of the entries in an order-book by checking them off in the course of his duty, may refresh his memory therefrom). *Washington*: *Brotton v. Langert*, 1 Wash. St., 227; s. c. 23 Pacific Rep., 803 (it is error to allow a witness to refer to a memorandum made by his clerk without his knowledge, and where it is not shown that the witness has any knowledge of the facts to which the memorandum refers). *Wisconsin*: *Stubbings v. Dockery*, 80 Wis., 618; s. c. 50 Northwest. Rep., 775 (it is not error to allow a witness to refer to entries in an order-book, made by another, where the witness had himself put a check mark against each entry to show that the goods were forwarded by him to the persons charged therewith).

III. Copies of Memoranda to refresh witness' memory.

Alabama: *Hawes v. State*, 88 Ala., 37; s. c. 7 Southern Rep., 302 (it is not error to allow a newspaper reporter, whose original notes have been destroyed, to refer to the published article to refresh his memory where he testifies that it contains the substance of the notes). *Mayor, etc., of Birmingham v. McPoland*, Ala., 1893, 11 Southern Rep., 427 (it is not error for the court to refuse to allow a witness to refresh his memory from a copy of his memorandum, which was copied by another, where the correctness of the copy has not been shown). *Kansas*: *McNeely v. Duff*, 50

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Kan., 488; s. c. 31 Pacific Rep., 1061 (a witness may refresh his recollection from any book or memoranda, whether it is itself admissible in evidence or not, provided he has a recollection independent of it). *Michigan*: Caldwell v. Bowen, 80 Mich., 382; s. c. 45 Northwest. Rep., 185 (a witness, who is asked to refresh his memory from a copy of a memorandum which he has made, cannot read it to the jury, as such procedure is equivalent to putting the copy in evidence). *Missouri*: Rose v. Rubeling, 24 Mo. App., 369 (a witness, who has an independent recollection, may be allowed to refresh his memory from books, not of original entry). *Nebraska*: Anderson v. Imhoff, 34 Neb., 335; s. c. 51 Northwest. Rep., 854 (a witness may refresh his memory from a copy of a memorandum of measurements, which he testifies is correct, where the original is lost). *New York*: Scott v. Slingerland, 44 Hun, 254 (an attorney as a witness may read a copy of a contract which he drew, in order to refresh his memory as to the contents of the original).

IV. *Memoranda as to numerous facts or items:*

Alabama: Stoudennie v. Harper, 81 Ala., 242 (where a witness testified that a memorandum was not a copy of the original entries in books, but a summary, and the books themselves were not in court,—*held*, that it was not error to allow the witness to refresh his memory from such memorandum, and to allow it to be exhibited to the jury). *Powell v. Henry*, Ala., 1892, 11 Southern Rep., 311 (it is not error to allow a witness, who has established the correctness of his book accounts to refresh his recollection as to amounts from a paper which he had drawn from the books a few days before the trial and as to which he is able to testify from an independent memory). *Georgia*: Finch v. Barclay, 87 Ga., 393; s. c. 13 Southeast. Rep., 566 (a witness may refresh his memory from a memorandum taken from his books, if after so refreshing it, he can testify from his own recollection). *Illinois*: Bonnett v. Glatfeldt, 120 Ill., 166 (it is not error to allow a witness to refresh his memory from a memorandum taken from his own books, if his memory, refreshed thereby, enables him to testify from his own recollection of the original facts; but he should not be allowed in such case to read from the copy); s. p. *Brown v. Galesbury Pressed Brick, etc. Co.*, 132 Ill., 648; s. c. 24 Northeast. Rep., 522. *Indiana*: Johnson v. Culver, 116 Ind., 278; s. c. 19 Northeast. Rep., 129 (a witness may refresh his memory by reference to a memorandum made by himself in a case where many items are involved; but he cannot testify entirely from the writing, he must have a recollection independent of the memorandum). *Maryland*: Nelson v. Columbian Iron, etc. Co., 76 Md., 354; s. c. 25 Atlantic Rep., 417 (it is error not to allow a witness to consult a price list to refresh memory where the lists are recognized by the trade as authority and the items are too numerous to be carried in the memory). *Michigan*: Robinson v. Mulder, 81 Mich., 75; s. c. 45 Northwest. Rep., 505 (a salesman as a witness may refresh his memory from the bill of particulars in the action, where he can remember the specific articles sold after referring to such bill, although he sent written orders

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for the goods or copies thereof to his employer, and he is not asked to refresh his memory from them). *Missouri*: *Wernwag v. Chicago, etc.*, R. Co., 20 Mo. App., 473; s. c. 4 Western Rep., 344 (a witness may refresh his memory from books or memoranda as to dates, sales, or other numerous items in respect to which no memory could be expected to be sufficient to retain); s. p. Third Nat. Bk. v. Owen, 101 Mo., 538; 14 Southwest. Rep., 632; *Stavinow v. Home Ins. Co.*, 43 Mo. App., 513; *Nipper v. Jones*, 27 *id.*, 538; *Robertson v. Reed*, 38 *id.*, 32; *Austin v. Boyd*, 23 *id.*, 317. *New York*: *Wise v. Phoenix Fire Ins. Co.*, 101 N. Y., 194 (in an action on an insurance policy there is no error in permitting plaintiff as a witness to refresh his memory by referring to the schedule attached to the proof of loss which was made a few days after the fire; to hold otherwise would be to make the witness dependent upon an unusual strength of memory); s. p. *Hartley v. Cataract Steam Engine Co.*, 46 State Rep., 374; s. c. 19 N. Y. Supp., 121. *Pennsylvania*: *Mead v. White*, 8 Atlantic Rep., 913 (a witness may use a paper containing a list of items to refresh his memory which he knows to have been correct when made, though the paper itself is not admissible in evidence). *Texas*: *Watson v. Miller*, 82 Tex., 279; s. c. 17 Southwest. Rep., 1053 (it is not error to refuse to allow a party as a witness to refresh his memory from a memorandum made by his attorney at his dictation from old letters and other writings).

V. *Cross-examination as to memoranda.*

Little v. Lischkoff, Ala., 1893, 12 Southern Rep., 429 (it is error not to permit the adverse party to cross-examine a witness as to entries in a book to which he has referred to refresh his memory on direct examination, unless such party should first put the book in evidence). *Steele v. Wisner*, 141 Pa. St., 63; s. c. 21 Atlantic Rep., 527 (it is not error on cross-examination to refuse to allow the witness to refresh his memory as to matters to which he has testified in chief from a letter with which the witness' connection is not shown). *O'Riley v. Clampet*, Minn., 1893, 55 Northwest. Rep., 740 (a party desiring to cross-examine a witness as to contents of a paper must introduce the paper as a part of his cross-examination). *Wernwag v. Chicago, etc.*, R. Co., 20 Mo. App., 473; s. c. 4 Western Rep., 343 (a memorandum used by a witness to refresh his memory must be produced for the benefit of the opposite party so that he may use it upon cross-examination); s. p. *Cortland Manuf. Co. v. Platt*, 83 Mich., 419; s. c. 47 Northwest. Rep., 330. *Kerr v. Lunsford*, 31 W. Va., 659; s. c. 8 Southeast. Rep., 493 (where a witness testifies that testimony of another person in another proceeding was incoherent and upon cross-examination states that the stenographer's notes of the same were substantially correct, it is not error to permit the notes to be read to the jury in order to contradict the witness).

NATIONAL ULSTER COUNTY BANK v. MADDEN.

N. Y. Court of Appeals, Second Division, 1889.

[Reported in 114 N. Y., 280; s. c., with note, in 23 Abb. N. C., 118, rev'g 41 Hun, 113.]

Although a witness may refer to his original memorandum for the purpose of refreshing his recollection, the memorandum is not made admissible merely by his testimony to its truth, but its admission must rest on the principle of necessity for the reception of secondary evidence; and it is not admissible if his testimony fairly indicates that he has a distinct recollection of the facts to which the memorandum referred; unless the memorandum is shown to have been made as part of the *res gestæ* of a fact properly in evidence.*

Plaintiff sued to recover the amount of eighteen checks; the defendant Madden was the payee and indorser, and defended on the ground that after indorsement the checks were made payable at a future day without his knowledge or consent.

The defendant Madden was called on his own behalf, and testified in chief: "I have examined every one of the checks in evidence, and the words making checks payable on a future day were not in any of them when I indorsed them; I never gave my consent to, or had any knowledge of their insertion. * * * When endorsed by me they were payable on the day they had date at the top of each one of them."

He further testified as follows:

"I kept a record of each one of these checks, at the time the endorsement was made by myself; every check I endorsed for him, before I left the check out of my hand or endorsed it, I entered it up in my bill book.

Q. What entry did you make upon the day the first check was endorsed?

The counsel for the plaintiff objected, that what entry witness made was immaterial and incompetent as evidence. That the

*The error for which the judgment was here reversed was that such a memorandum cannot properly be read in evidence, and the court treated the act of the witness in reading from his memoranda as a "reading in evidence."

If the record had made it clear that the offer of counsel and the act of the witness amounted only to the witness testifying while aiding himself as to details by having the paper under his eye, and that the memoranda were not as documents read in evidence, the rule in *Bigelow v. Hall*, pp. 410-413 of these cases, would have applied.

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witness' own act is not competent evidence upon his direct examination, in his own behalf, as corroborative of his statement.

The objection overruled and exception taken.

A. It shows the date of the check, the amount, endorser, drawer, the place where due—The National Bank; the time when it was due was October 18.

Q. Take the next date?

A. (Defendant reads from book) October 21; S. M. Fowks; M. J. M.; The Nat. Bank; no time; payable the same day; amount \$75.

The counsel for the plaintiff renews and makes same objection to each of the checks as above. Objection overruled and exception taken by plaintiff.

The witness then proceeded, and against such objections of the plaintiff was allowed to, and read from such book a similar entry in relation to each one of the other checks in evidence."

At Circuit, judgment was entered for defendant.

The General Term of the Supreme Court affirmed the judgment. They were of opinion that such an abstract could be used, on the same principle as a copy; also that the principle applied that in a conflict of evidence that which tends to corroborate a witness may be proved, though it might not otherwise be competent.

The Court of Appeals reversed the judgment.

BRADLEY, J. The action was brought to recover the amount of eighteen checks drawn by the defendant, Sarah M. Fowks, by her attorney, Horatio Fowks, upon the National Bank of Rondout and payable to the order of the defendant, Madden, and endorsed by the latter. Madden alone defended, and alleged that after the checks were endorsed by him, they were altered in respect to the time for payment, so as to make them payable at a future day without his knowledge or consent. He testified that when so endorsed by him no time of payment was expressed in any of them. When they were discounted by the plaintiff, they respectively appeared to be payable at specified times subsequent to their dates. The defendant Madden also

testified that when he endorsed the several checks, he made a memorandum entry of the dates, amounts and time when payable of them respectively, and in his examination in chief, in his own behalf, he was permitted against the objection and exception of the plaintiff's counsel to read such memoranda to the jury. The main question arises upon the admissibility of those entries in evidence. The rule in this state, prior to the decision in *Merrill v. The Ithaca & Oswego R. R. Co.*, 16 Wend., 586, was that a witness might refer to his memorandum to refresh his memory, and then was permitted to testify to the facts, provided he could do so independently of it upon his recollection. That was the extent of the rule in this respect (*Feeter v. Heath*, 11 Wend., 479; *Lawrence v. Barker*, 5 *id.*; 301).

In the *Merrill* case, the court reviewed the cases, and cited text books upon the subject, and announced the conclusion, that original entries read by a witness and which he should testify, were correctly made, might be read in evidence, though he remembered nothing of the facts represented by them, but that to render such entries admissible, it should appear that "every source of primary evidence had been exhausted." Since then, so far as we have observed, it has uniformly been held admissible for the witness to refer to the original entries in respect to the facts, which he is called upon to testify, and if he verifies their correctness and is unable to recollect such facts independently of such entries, they may be read in evidence (*Bank of Monroe v. Culver*, 2 Hill, 531; *Cole v. Jessup*, 10 N. Y., 96; *Halsey v. Sinsebaugh*, 15 *id.*, 485; *Russell v. Hudson River R. R. Co.*, 17 *id.*, 134; *Guy v. Mead*, 22 *id.*, 462; *Squires v. Abbott*, 61 *id.*, 530-535; *Howard v. McDonough*, 77 *id.*, 592; *Peck v. Valentine*, 94 *id.*, 569; *Mayor, etc. v. Second Ave. R. R. Co.*, 102 *id.*, 572-580; *Brown v. Jones*, 46 Barb. 400; *Meacham v. Pell*, 51 *id.*, 65; *Kennedy v. O. & S. R. R. Co.*, 67 *id.*, 170-182).

The General Term cited on this question *Guy v. Mead* (*supra*) and made the remark, that while that case differed from this in the fact that there the witness had no recollection of the matter independently of the memorandum referred to, the court did not place its decision upon that ground. Although in that case the court did not expressly declare that the admissibility

of the evidence was dependent upon the want of recollection of the witness, the fact existed which rendered the paper competent evidence within the rule as before stated. And reference was there, with apparent approval, made to *Russell v. Hudson River R. R. Co.* (*supra*), where the judgment of the court below was reversed for error in receiving a memorandum in evidence, when for aught that appeared, the witness had recollection of the facts, to which he was called upon to testify, independently of it. And the cases above cited, determined subsequently to *Guy v. Mead*, state and adhere to the doctrine that original entries made by a witness are admissible as auxiliary to his evidence, only when he is unable to distinctly recollect the fact without the aid of it. This proposition seems well settled in this state by a current of authority for the last fifty years, which now requires adherence to it, unless it may be seen that it works unjustly upon the rights of the parties. The rule which renders such entries admissible rests upon the principle of necessity for the reception of secondary evidence, and is not applicable where the witness has a distinct recollection of the essential facts to which they relate. The primary common law proof is there furnished, and the necessity for evidence of the lesser degree does not arise, and this right so qualified to introduce such secondary evidence is the better rule in view of the opportunity, which otherwise might exist, to super-add a written memorandum to the evidence of a witness, which, it cannot be said, would not sometimes be improperly made available to strengthen his testimony with a court or jury, and such may be within reasonable apprehension until the moral infirmity of human nature becomes exceptionally less than it yet has. This reason for the rule so limited has also been in the minds of the courts in deciding the cases declaring it (*Meacham v. Pell*, 51 Barb., 65-68; *Driggs v. Smith*, 4 J. & S., 283; *Russell v. Hudson River R. R. Co.*, 17 N. Y., 134).

In holding, as we do, that entries made by a witness are not admissible unless it appear that he does not recollect the occurrence, to which they relate, independently of them, we but reaffirm what may be deemed the rule already quite well established in that respect.

In the present case it not only did not so appear, but the evidence of the defendant fairly indicated that his recollection was distinct of the facts in issue to which his memoranda referred.

The ruling which permitted the entries to be read in evidence therefore was error, unless they may, as contended by the defendant's counsel, be treated and admissible as part of the *res gestæ*. It is difficult to see that it does, and we think it does not come within that doctrine. The entries were made by the defendant and were descriptive of the paper endorsed by him. The acts which he then was called upon to do, and did do, were to endorse the checks. The fact of the endorsement by him of his name upon them is not questioned. The act of making the entries was not illustrative of that of the endorsement, nor did it tend to characterize it, and it does not come within the rule requisite to permit it to be treated as part of the transaction (Wharton's Ev., § 259; Nutting v. Page, 4 Gray (Mass), 581, 584; Moore v. Meacham, 10 N. Y., 207; Tilson v. Terwilliger, 56 *id.*, 277).

The case of Bigelow v. Hall, 91 *id.* 145, is not applicable in that respect to the situation presented in this case. There the parties participated in making the entries at the time of the transaction and they had relation to it, while here the current entries were made by the defendant alone, and all that Fowks appears to have done was to make from time to time entry of a supposed past act of payment of a previously endorsed check, and that was done before the defendant's entry descriptive of the succeeding one, and with the latter entry the party procuring the endorsement had nothing to do, nor does it appear that he was then advised of the entry as made by the defendant. (Brown v. Thurber, 58 How. Pr., 95-97).

The evidence of the person who represented the drawer of the checks and drew them as her attorney was contradictory of that given by the defendant Madden in every respect essential to the issue presented at the trial. It cannot be seen that the reading to the jury of the memoranda may not have had some influence upon their action on the main question of fact, which they were required to determine..

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The alleged alteration was a material one, and the finding that it was made after the defendant's endorsement and without his consent, presumptively required the conclusion that the checks so altered were rendered invalid as against the endorser, and that such defendant was entitled to a verdict (*Crawford v. West Side Bank*, 100 N. Y., 50).

The presumption in such case is that it was so made as to vitiate it, and the burden is with the party seeking to make an altered instrument the basis of recovery to relieve it from the effect of the unauthorized alteration, which may be done by showing that it was made by a stranger to it (*Waring v. Smyth*, 2 Barb. Ch., 119; *Herrick v. Malin*, 22 Wend., 388; *Smith v. McGowan*, 3 Barb., 404).

Nothing appears in this case to indicate that any relief in that manner can be had from the effect of the alteration, if the jury find it was made after the endorsement and without the knowledge or consent of the endorser.

No other question presented here by the plaintiff's counsel seems to require consideration.

The judgment should be reversed and a new trial granted, costs to abide the event.

All the judges concurred, except PARKER, J., not sitting.

HALSEY v. SINSEBAUGH.

New York Court of Appeals, 1857.

[Reported in 15 N. Y., 485.]

Where it is competent to prove what was testified to by a witness on a former trial, an attorney, who testifies that he was present at the trial and as attorney took notes of the testimony and has no doubt of the correctness of his notes, which he produces, may read such notes, although he has no present recollection of the facts.

Plaintiff sued for purchase money of land.

The answer contained a denial of the contract and allegations of mistake in the instrument and of false representations.

On the trial plaintiff called a witness who gave testimony to show that a witness for defendant had testified differently on a

former trial of the cause, and other witnesses gave testimony against the character of the same witness for truth and veracity.

The defendant for the purpose of sustaining the witness, called an attorney who testified "I am one of the attorneys in this cause. In that capacity I took down the testimony on the first trial of this action. I took it down correctly. I have no doubt of its correctness. [Paper shown to witness.] These are my minutes taken on the first trial.

Q. By defendant's counsel: How did Isaiah Sinsebaugh testify on the first trial of this cause as to the ability of defendant to read writing?

Plaintiff's counsel objected to the witness answering unless he had a recollection independent of his minutes.

The witness said he had not, and the objection was sustained; and exception taken.

At Circuit judgment was entered for the plaintiff, upon a verdict.

The Supreme Court at General Term affirmed the judgment without opinion.

The Court of Appeals reversed the judgment.

SELDEN, J. Upon the trial of this cause, an attempt having been made to impeach one of the defendant's witnesses by showing that he had sworn differently upon a former trial of the cause, the defendant, for the purpose of sustaining the witness, called one of the counsel engaged in the former trial, who testified that he was present at the first trial, and took notes of the testimony, and that he had no doubt of the correctness of his notes, which he produced. The plaintiff's counsel then objected to his stating what the witness had said, unless he recollected the testimony independently of his minutes; and upon his saying that he did not, the objection was sustained and the evidence excluded.

Although the memorandum, from which the witness was called upon to testify in this case, consisted of the minutes of testimony taken upon a previous trial of the cause, I am not aware that such cases are governed by any peculiar rule, but

Halsey v. Sinsebangh, 15 N. Y., 485.

regard the exception taken by the defendant's counsel as presenting the general question, whether a memorandum made at or about the time when the event or transaction mentioned in it took place, and where the author swears that he knows it to have been correct when made, can be read to the jury in connection with the oral testimony of the witness; or whether the evidence is confined to what the witness is able to recollect, after refreshing his memory by referring to the memorandum.

The learned judge who presided at the trial, seems to have followed the rule laid down by Mr. Phillips, in his work upon evidence, which is, in substance, that such memoranda may be used to refresh the recollection of the witness, but can have no force as evidence, unless the witness, after referring to the memorandum, has a present recollection of the facts to which the memorandum relates.

This was, no doubt, at one time, supposed to be the true rule, and as such it was adopted and followed in several cases, by the courts of this and other states. (Lawrence v. Barker, 5 Wend., 301; Feeter v. Heath, 11 Wend., 485; Calvert v. Fitzgerald, 1 Litt. Sel. Cas., 388; Juniata Bank v. Brown, 5 Serg. & Rawle, 232.) But in the case of the State v. Rawls (2 Nott & McCord, 334), this rule was subjected to a critical examination by the Constitutional Court of South Carolina, and was, as I think, proved to have originated in a misapprehension of the cases of Doe v. Perkins and Tanner v. Taylor, cited by Mr. Phillips in its support. The commentary by Nott, J., upon those cases shows conclusively that the memoranda there produced, were not the originals, made by the witness at the time the events occurred, but mere copies or extracts from such originals taken long afterwards.

This commentary, which is quoted *in extenso* and approved by Cowen, J., in the case of Merrill v. Ithaca & Oswego Railroad Company (16 Wend., 596), seems to me entirely just and sound; and I entertain no doubt that Mr. Phillips fell into an error from not discriminating with sufficient care between the original memorandum itself and a mere copy. This subject is treated with much learning and ability in the Notes to Phillips' Evidence, by Messrs Cowen & Hill (note 528 to p. 290), where

the authorities bearing upon it are elaborately reviewed; and I fully assent to the principle there stated, "that an original memorandum, made by the witness presently after the facts noted in it transpired, and proved by the same witness at the trial, may be read by him, and is evidence to the jury of the facts contained in the memorandum, although the witness may have totally forgotten such facts at the time of the trial."

There are various cases, English as well as American, in addition to *The State v. Rawls* and *Merrill v. Ithaca & Oswego Railroad Company* (*supra*), which tend to support this rule. (Cases cited in Cow. & Hill's Notes, *ubi supra*). It is quite obvious that the doctrine supposed to be derived from the work of Mr. Phillips would serve in many cases to defeat the ends of justice, and particularly in cases where witnesses are called upon to testify to the language of parties, used upon occasions long previous. It is well known that the efforts of memory are seldom equal to the task of recalling, after any considerable lapse of time, even the exact substance of words and phrases; while it would be comparatively easy, at the time or immediately afterwards, to make an accurate record of their import. To exclude such a record, when shown to have been honestly made, would be to reject the best and frequently the only means of arriving at truth.

The same reasoning applies to memoranda in regard to dates, sums, &c., and, although with perhaps less force, to memoranda in general, if made at or about the time when the events which they record transpired, and duly verified by the oath of the party making them. It follows from these views that the exception to the ruling of the judge upon this point was well taken.

The judgment should be reversed and there should be a new trial, with costs to abide the event.

DENIO, C. J., COMSTOCK, JOHNSON, PAIGE and BOWEN, JJ., concurred in this opinion.

BROWN, J., read an opinion for reversing the judgment upon another ground, reserving his judgment upon that discussed by SELDEN, J.; and SHANKLAND, J., took no part in the decision.

Judgment reversed and new trial ordered.

Peck v. Valentine, 94 N. Y., 569.

PECK v. VALENTINE.

New York Court of Appeals, 1884.

[Reported in 94 N. Y., 569.]

An original memorandum made by a witness can be used to refresh his recollection; or, if he has forgotten the facts stated and cannot on seeing the memorandum recall them, yet if he states that it was a true statement of a transaction known to him at the time, it may be read in evidence in connection with and as auxiliary to his testimony. But secondary evidence of the contents of such memorandum is inadmissible, even after proof of its loss, being mere hearsay.

Action against an agent, for alleged embezzlement of moneys received on sales.

For the purpose of proving the defendant's failure to enter in the cash-book all moneys received by him on sales, one Leggett was called as a witness who testified that he was employed in plaintiff's lumber yard in July, 1879, and kept on a loose piece of paper an account of moneys received by the defendant from sales of lumber from the 1st to the 18th of that month; that the entries were made each day, continuously, except Sunday, and were correct; that he gave the paper to the plaintiff, and that the defendant never saw it.

The plaintiff testified that he received the memorandum from Leggett, and had lost it; but that he copied the figures correctly into a memorandum-book (which he produced), and that the entries had not been altered. The entries in the memorandum-book were then offered and received in evidence, under the defendant's objection.

Judgment was entered for the plaintiff upon the report of a referee.

The Supreme Court at General Term affirmed the judgment; being of opinion that what the witness Leggett was unable to remember himself, the plaintiff could prove by other witnesses. The witness, Leggett, gave to the plaintiff this memorandum and he transcribed it. This copy was admissible as proof of the lost paper, and that paper thus reproduced was part of the

evidence of the witness Leggett. It was therefore direct, positive, and if credited, conclusive proof of the fact that the defendant received one sum of money belonging to plaintiff and returned a less sum.

The Court of Appeals reversed the judgment.

ANDREWS, J. [*after stating the facts*]: We think the entries were not competent evidence. The original memorandum, if it had been produced, could have been used by Leggett to refresh his recollection; or if he had forgotten the facts stated, and could not on seeing the memorandum recall them, yet if he had been able to state that it was a true statement of the transactions, known to him at the time, it could have been read in evidence in connection with, and as auxiliary to his testimony. (*Guy v. Mead*, 22 N. Y., 462.) But the adverse party, on production by the witness of the memorandum, would have had the right of inspection and cross-examination, a right of great importance as a protection against fabricated evidence. (*Stephens on Evidence*, art. 136; *Cowen, J., Merrill v. Ithaca, etc., R. R. Co.*, 16 Wend., 600.) In this case the memorandum was not produced and Leggett was not sworn as to its contents, for the reason doubtless that he could not remember what it contained. The only evidence to connect the entries in the plaintiff's book with the original memorandum, or to establish the amount of money received by the defendant during the time stated, was the oath of the plaintiff that the entries were a true transcript from the memorandum in connection with the testimony of Leggett that the memorandum was a true statement of the transactions at the time. The original memorandum was the mere declaration of Leggett in writing of certain facts observed by him. The case is not distinguishable in principle from what it would have been if there had been no memorandum and the plaintiff had been permitted to prove the oral representations of Leggett to him of the same facts. This would be mere hearsay, and the fact that the statement instead of being oral was written does not alter the character of the evidence. A similar question was presented in *Clute v. Small* (17 Wend., 238). The plaintiff in that case sought to prove an admission of the defendant made to the

Peck v. Valentine, 24 N. Y., 569.

sheriff at the time of the service of the writ, and was permitted to prove the contents of a letter written by the sheriff to the plaintiff's attorneys on returning the process, in which he reported the admission made by the defendant. The letter was lost and the sheriff testified that he could not recollect the contents of the letter or what the defendant had said, but that what he wrote was undoubtedly as stated by the defendant. The evidence of the sheriff was held to be inadmissible, Cowen, J., saying: "There was only one of two ways in which he could be allowed to speak, that is, either from positive recollection or from seeing the letter and knowing it to be his own statement." And again: "The inquiry here was no more than the common one to a witness; would you have asserted such a matter unless it had been true? and on obtaining the witness' affirmative answer, going on to prove what he did say."

The substantive fact sought to be proved in this case was the receipt by defendant of moneys for which he had not accounted. It could be proved by any competent common law evidence. But the original memorandum of Leggett was not original or primary evidence to charge the defendant.

It was not a writing *inter partes*, nor one creating rights or of which rights could be predicated, as a will, contract or deed; nor was it a record of transactions in the ordinary course of business, as books of account, nor a paper made by the defendant, or to which he was in any way privy. It was apparently a private statement of an exceptional transaction, made by an agent in aid of his memory, for the information of his principal. The facts stated were relevant and could be proved by any one who could testify to their existence, either directly as matter of personal recollection, or from a memorandum made by him, which he could verify as true. The entries in the plaintiff's book were not authenticated by Leggett. Whether they were a correct transcript of his original memorandum depended solely upon the plaintiff's evidence. The original memorandum was not a writing the contents of which, if lost, could be proved by secondary evidence. The rule upon that subject relates to writings which are in their nature original evidence, and in case of loss, their contents are from necessity allowed to be proved

Guy v. Mead, 22 N. Y., 462.

by parol. We think the admission of the entries from the plaintiff's book was not justified by any rule heretofore established and to extend the rule so as to admit a copy of a memorandum not in its nature original evidence of the facts recorded and not verified by the party who made the original and knew the facts, would open the door to mistake, uncertainty and fraud, a consequence far more serious than would flow from a restriction which in a particular instance might seem to prevent the ascertainment of truth.

For the error in admitting the entries the judgment should be reversed and a new trial ordered.

All concur.

Judgment reversed.

GUY v. MEAD.

New York Court of Appeals, 1860.

[Reported in 22 N. Y., 462.]

A memorandum is competent, which the maker swears was made at or about the time when the event or transaction mentioned in it took place, and that he knows it was correct when made, but has no recollection of the fact.

It is not necessary that such memorandum be made in the course of business.

This principle applies even where the memorandum is used to show negatively that something not noted did not exist.

Plaintiff sued as transferee after maturity of a promissory note for \$250, made by defendant, to George Sharts, or bearer.

The note had two endorsements of payments, as follows: "\$90.00. Received on the within note ninety dollars, January 20th, 1846. \$40.00 Received on the within note February, 26th, forty dollars, 1849."

The defence was payment.

On the trial, plaintiff gave evidence that the \$40 was paid at the date of the endorsement, February, 1849, while the defendant gave evidence that it was paid in February, 1847, and not in 1849.

Guy v. Mead, 22 N. Y., 462.

The plaintiff for the purpose of showing that it was not endorsed at the time claimed by the defendant, called one Ingersoll as a witness, who testified, on direct examination that he saw the note on April 1st 1848; that it then had but one endorsement; that he cast the interest on the note for George Sharts, and that he had "the cast" before him on the original paper while testifying.

The paper contained a statement of the first endorsement of \$90, January 20th, 1846, and the interest up to April 1st, 1848.

Upon cross-examination he said "independent of the writing I have no recollection of the time when said cast of interest was made; but from an examination thereof I have no doubt the statement therein is accurate, and the \$40 endorsement was not on the note when said computation was made."

Plaintiff offered to read the paper in evidence to sustain his position that the endorsement of the \$40 was not on the note in 1848.

Defendant objected; objection sustained; evidence excluded and plaintiff excepted.

The Supreme Court at General Term directed judgment for defendant on the verdict, the majority of the judges being of opinion that a memorandum to be received in evidence of a fact, instead of the recollection of the witness, who made it, must show the *existence* of the fact sought to be established.

The Court of Appeals reversed the judgment.

DENIO, J. Formerly, I think, it was the doctrine of the courts of this State that such a paper could not be given in evidence as an independent piece of testimony. The rule was, that it might be referred to by a witness, to refresh his memory, but he must then swear to the truth of the facts, or his statement would not be evidence. (*Lawrence v. Barker*, 5 Wend., 301.) The doctrine was so stated by the Chancellor, in the Court of Errors, in *Feeter v. Heath* (11 Wend., 485). But the subject has been re-examined since these cases were decided, and a different rule now prevails. In *Merrill v. The Ithaca and Owego Railroad Company* (16 Wend., 599), Judge COWEN examined the cases upon this rule of evidence at great length, and

his conclusion was, that original entries might be read in evidence, though the witness had forgotten the fact attested by them; but he said that, in this state, the rule was restricted to entries made by a person in the course of his business. He seemed to consider that qualification peculiar to this state. In the *Bank of Monroe v. Culver*, (2 Hill, 531) the rule is laid down with that limitation, and applied to the case of entries made by clerks in a bank in the regular course of their duties. In *Halsey v. Sinsebaugh* (15 N. Y., 485), the question—whether a memorandum, made at or about the time when the event or transaction mentioned in it took place, and where the author swears that he knows it to have been correct when made, can be read to the jury in connection with the oral testimony of the witness; or whether the evidence is confined to what the witness is able to recollect after refreshing his memory by referring to the memorandum—came up for decision in this court. The memorandum referred to was the minutes of testimony taken by the counsel upon a former trial of the cause; the matter to be proved being what a witness had sworn to on that trial; and it was held to be admissible. The paper did not fall within the rule as an entry made in the course of business, like the memoranda and entries made by clerks in banks and the like; and it was not placed on that footing in the opinion of the court. On the contrary, Judge SELDEN, by whom the opinion was prepared, took pains to say that he did not consider that the case of such a memorandum as the one then in question was governed by any peculiar rule, but that the general question was presented, whether a memorandum, that is, any memorandum, made and sworn to in the matter stated, would be admissible. The whole of the reasoning of the opinion, and the cases relied on, sustain the position as a general one, applicable to every species of memorandum, and are not restricted to the routine entries referred to.

I am, therefore, of opinion that the qualification, formerly considered as annexed to the rule, has been abolished; and although my reluctance to depart from decisions upon practical questions, which have been long acted upon, would not have permitted me to propose such a change as was made in this

instance, I am convinced that the former doctrine was based upon a misunderstanding of some earlier adjudications, and that the principle now established is, at least, equally conducive to the elucidation of truth, which should be the object of all rules of evidence. In *Russell v. The Hudson River Railroad Company* (17 N. Y., 134), the memorandum which had been received in evidence was a written statement made by a surgeon as to the character of the injuries which the plaintiff had sustained by the alleged negligence of the defendants, and of the remedies applied, made at the time the witness was called on to attend him. It was not doubted, in the opinion of the court, that the memorandum was one to which the rule applied; but a new trial was granted, because it did not appear but that the witness had a perfect recollection of all the matters sought to be proved by the memorandum.

I have not intended to be influenced in my conclusion as to the true rule of evidence by the peculiar aspect of this case; but I cannot avoid remarking, that if this computation of interest was actually made, as stated, in April, 1848, for the purpose of ascertaining the amount due on the note, the memorandum of it then made is one of the most satisfactory pieces of evidence which could be adduced as to the existence of the indorsement. The parties to the alleged transaction had sworn differently upon the point, and several alleged declarations on one side or the other had been given in evidence. If this paper was made at the time and for the purpose claimed, it furnishes written evidence of the most authentic character, made when the party who now seeks to produce it to the jury had no interest in fabricating it. To my mind it would be more persuasive evidence than any amount of oral statement verified by the oaths of the parties interested, or of verbal declarations proved to have been made by those parties.

Judgment reversed.

Maxwell v. Wilkinson, 113 U. S., 657.

MAXWELL v. WILKINSON.

United States Supreme Court, 1885.

[Reported in 113 U. S., 657.]

A memorandum made from other memoranda since destroyed, and a long time—in this case, twenty months—after a transaction, of which the one, who made the memorandum, now testifies that he has no recollection, but which he knows took place because so stated in the memorandum, and because his habit was never to sign statements unless true, cannot be read in aid of his testimony.

Plaintiffs sued to recover back duties paid by them on imported iron on October 23, 1852.

The main question was whether the duties had been paid under protest.

The plaintiffs introduced evidence tending to show that the entry of the goods, to which any protest would have been attached, could not be found at the custom house, and called William S. Doughty, a clerk of their consignees, who produced a copy of protest, purporting to be dated October 13, 1852, and to be signed by the consignees, and having upon it, these two memoranda: First, in pencil, "Handed in on the 23d day of October, 1852." Second, in ink, "The above protest was handed to the collector the 23d day of October, 1852. New York, June 16th, 1854. Wm. S. Doughty."

Doughty, on direct examination, testified that he handed the original, of which this was a copy, to the collector on October 23, 1852. Being then cross-examined by leave of the court, he testified that the memorandum in ink was written by him on June 16, 1854; that he had previously made the memorandum in pencil so as to be able to make a statement in ink at some future time; that he did not know when he made the pencil memorandum; that he could not tell, otherwise than as his memory was refreshed by the memorandum; that he ever filed a protest with the collector; that he had no recollection now that he filed such a protest; but that he must have done it because it was his duty to do it; and that he was willing to swear positively that he did so, because he had signed a statement to that effect, and his

Maxwell v. Wilkinson, 113 U. S., 657.

habit was never to sign a statement unless it was true. The witness then, by permission of the court, voluntarily stated as follows: "The fact that the statement was made two years after was when there was sufficient data for me unquestionably to make that statement at the time two years afterwards. Probably there were memoranda which were destroyed long ago."

The defendant's counsel, thereupon, objected to the admission in evidence of the alleged copy of the protest, "upon the ground that the witness testifies that he has no recollection of the fact of the service of the original upon the collector at or prior to the time of the payment in question, and that the memorandum referred to by the witness, as the basis of his willingness to swear to the fact without any recollection, was not made for nearly two years after the transaction to which it relates, and that the data upon which the witness made the memorandum to which he refers are not produced or shown."

The court overruled the objection and admitted the copy of the protest in evidence.

In the United States Circuit Court a verdict was returned for the plaintiffs and judgment entered.

The United States Supreme Court reversed the judgment.

GRAY, J. [*after stating the facts*]: "The witness, according to his own testimony, had no recollection, either independently of the memoranda, or assisted by them, that he had filed a protest with the collector; did not know when he made the memorandum in pencil; made the memorandum in ink twenty months after the transaction, from the memorandum in pencil, and probably other memoranda, since destroyed and not produced, nor their contents proved; and his testimony that he did file the protest was based exclusively upon his having signed a statement to that effect twenty months afterwards, and upon his habit never to sign a statement unless it was true.

Memoranda are not competent evidence by reason of having been made in the regular course of business, unless contemporaneous with the transaction to which they relate. *Nicholls v. Webb*, 8 Wheat., 326, 337; *Insurance Co. v. Weide*, 9 Wall., 677 and 14 Wall., 375; *Chaffee v. United States*, 18 Wall., 516.

It is well settled that memoranda are inadmissible to refresh the memory of a witness unless reduced to writing at or shortly after the time of the transaction, and while it must have been fresh in his memory. The memorandum must have been "presently committed to writing," Lord Holt in *Sandwell v. Sandwell*, Comb., 445; s. c. Holt, 295; "while the occurrences mentioned in it were recent and fresh in his recollection," Lord Ellenborough in *Burrough v. Martin*, 2 Camp., 112; "written contemporaneously with the transaction," Chief Justice Tindal in *Steinkeller v. Newton*, 9 Car. & P., 313; or "contemporaneously or nearly so with the facts deposed to," Chief Justice Wilde (afterwards Lord Chancellor Truro), in *Whitfield v. Aland*, 2 Car. & K., 1015. See also *Burton v. Plummer*, 2 Ad. & El., 341; s. c. 4 Nev. & Man., 315; *Wood v. Cooper*, 1 Car. & K., 645; *Morrison v. Chapin*, 97 Mass., 72, 77; *Spring Garden Ins. Co. v. Evans*, 15 Maryland, 54.

The reasons for limiting the time within which the memorandum must have been made are, to say the least, quite as strong when the witness, after reading it, has no recollection of the facts stated in it, but testifies to the truth of those facts only because of his confidence that he must have known them to be true when he signed the memorandum. *Halsey v. Sinsebaugh*, 15 N. Y., 485; *Marcy v. Shults*, 29 N. Y., 346, 355; *State v. Rawls*, 2 Nott & McCord, 331; *O'Neill v. Walton*, 1 Rich., 234.

In any view of the case, therefore, the copy of the protest was erroneously admitted, because the memorandum in ink, which was the only one on which the witness relied, was made long after the transaction which it purported to state; and its admission requires that the judgment be reversed, and a new trial ordered.

Judgment reversed.

NOTE.—In *Downs v. New York Central R. R. Co.*, 47 N. Y., 83, an action for injury to plaintiff, while a passenger on the defendant's road, alleged to have been caused by the defendant's negligence, the defendant's counsel offered in evidence a newspaper account of the transaction, prepared from accounts received on the day and at the place of the accident. The author testified that he talked with the plaintiff and others about it, and supposed he got his information from them.

He had no distinct recollection of what was said to him, but knew that

 Note on Use of Memoranda as Evidence.

what he published then were the facts he had got; from whom, principally, he could not say.

After refreshing his recollection by reading the article, he was unable to testify that he received the statement from the plaintiff, or from whom he did receive it.

Held, not error to exclude the article, ALLEN, J., saying on this point: "The article did not purport to be, and was not, in truth, a statement of a conversation with, or declarations made by, the plaintiff, and was not a memorandum made by the witness of a particular conversation at or near the time it was had, and which the witness could state under oath was a correct memorandum of such conversation. It was not, therefore, competent as evidence of a statement made by the plaintiff, material to the issue, or inconsistent with his testimony on the trial. The printed paper was not the original memorandum made by the witness; neither did he, nor could he, testify that the article, or the copy from which it was printed, was a correct memorandum or reproduction of the statement of the plaintiff, and it is not within the principle of any of the cases relied upon by the defendant. In all the cases, the original memoranda have been produced, and the persons by whom they were made have vouched for their correctness. (*Guy v. Mead*, 22 N. Y., 462; *Halsey v. Sinsebaugh*, 15 N. Y., 485; *Russell v. Hudson R. R. Co.*, 17 *id.*, 134.) The article was but a summary of the facts collected by the writer from all sources, or rather of his understanding of the facts."

NOTES OF CASES ON USE OF MEMORANDA AS EVIDENCE IN CONNECTION WITH WIT- NESS' TESTIMONY.

Alabama: *Battles v. Tallman*, 1892, 11 Southern Rep., 247 (it is error to receive in evidence a memorandum of a census enumerator to prove a person's statement as to the age of his daughter, when it was not first shown that the enumerator after examining the memorandum could not testify from his recollection). *Illinois*: *Jones v. Smith*, 37 Ill. App., 169 (time tickets signed by a witness, who verifies their accuracy, may be admitted in evidence where the witness testifies that they are necessary to enable him to recollect the matters sought to be proved thereby). *Hayden v. Hoxie*, 27 *id.*, 533 (unless the necessity for the use of a memorandum is made to appear by the witness' own testimony, it is not error to refuse to admit it in evidence). *Maryland*: *Owens v. State*, 67 Md., 307; s. c. 10 Atlantic Rep., 210 (where a witness testifies to the truth of a memorandum when made, it is not error to admit it in evidence in confirmation of what the witness states from memory). *Massachusetts*: *Miller v. Shay*, 145 Mass., 162; s. c. 13 Northeast. Rep., 468 (where items are numerous, plaintiff, as a witness, may use his account book in aid of his memory; and where he so uses it, it is not prejudicial error to permit the book to go to

 Note on Use of Memoranda as Evidence.

the jury). *Michigan*: *Passmore v. Passmore*, 60 Mich., 463; s. c. 27 Northwest. Rep., 463 (it is not error to allow a memorandum book by which a witness fixes dates to be submitted to the jury). *Minnesota*: *National Bank of Commerce v. Meader*, 40 Minn., 325; s. c. 41 Northwest. Rep., 1043 (a memorandum of a witness, who has already testified from his recollection as to the facts to which it refers, is inadmissible in evidence). *New Hampshire*: *Pinkham v. Benton*, 62 N. H., 687 (a memorandum is admissible in evidence where the witness verifies it as true when made, has since forgotten the transaction to which it refers, and is unable to recall it after examining the memorandum). *New Jersey*: *North Hudson County R. Co. v. May*, 48 N. J. L., 401; s. c. 4 Central Rep., 81 (it was held not error to refuse to allow a written statement as to an accident made by a conductor the day after it occurred, to be admitted in evidence; as such statement was not under oath, and if it was untrue the conductor could not be punished for perjury). *New York*: *National Ulster Co. Bk. v. Madden*, 114 N. Y., 280 (it is error to admit a memorandum in evidence where it is not shown that the witness has forgotten the circumstance); s. p. *Voisin v. Commercial Mut. Ins. Co.*, 67 Hun, 351; s. c. 51 State Rep., 635; 22 N. Y. Supp., 348. *Carradine v. Hothchkiss*, 120 N. Y., 608; s. c. 24 Northeast. Rep., 1020 (it is not error to exclude a memorandum of a conversation when offered as evidence in chief, where the party who made it, has already testified as to what was said); s. p. *Cunard v. Manhattan R. Co.*, 1 Misc. R., 151; s. c. 48 State Rep., 755; 20 N. Y. Supp., 724. *Cunningham v. Massena Springs, etc., R. Co.*, 63 Hun, 439; s. c. 44 State Rep., 723; 18 N. Y. Supp., 600 (it is not error to receive in evidence a memorandum of the measurements of work made while the work was being done, where the witness has no independent memory as to such measurements). *Oregon*: *Friendly v. Lee*, 20 Oreg., 202; s. c. 25 Pacific Rep., 396 (where a witness has a distinct recollection of an occurrence there is no error in refusing to permit his memorandum thereof to be read to the jury). *Pennsylvania*: *Du Bois City Nat. Bk. v. First Nat. Bk. of Williamsport*, 114 Pa. St., 1 (a diary by which a witness fixes a date need not be produced for inspection by the jury). *United States*: *Glaspie v. Keator*, 8th U. S., Cir. Ct. App., 1893, 56 Fed. Rep., 203 (a memorandum made by two persons in estimating the quantity of timber from examination only, and not from actual measurement may be referred to by either to refresh his memory and when so used it is admissible in evidence in connection with his testimony); s. p. *Continental Ins. Co. v. Insurance Co. of Pa.*, 1 U. S. App., 201; s. c. 2 Cir. Ct. App., 535; 51 Fed. Rep., 884. *Vermont*: *Bates v. Wager*, 64 Vt., 326; s. c. 24 Atlantic Rep., 745 (a witness' memorandum is admissible in evidence in connection with his testimony to explain and elucidate it, though such memorandum is not admissible as independent evidence); s. p. *Batés v. Sabin*, 64 Vt., 511; s. c. 24 Atlantic Rep., 1013. *Wisconsin*: *Curran v. Witter*, 68 Wis., 16; s. c. 31 Northwest. Rep., 705 (it is error to exclude the testimony of the person who made a memorandum as to its correctness, where he does not distinctly remember the transaction, and to refuse to admit the memorandum in evidence).

Ocean Ntl. Bank v. Carll, 55 N. Y., 440 ; 9 Hun, 239.

OCEAN NATIONAL BANK OF THE CITY OF NEW
YORK v. CARLL.*New York Court of Appeals, 1874.*[Reported in 55 N. Y., 440 ; again, in *Supreme Court*, 1876, 9 Hun, 239.]

Entries made in the usual course of duty by a person still living and within the state, are not receivable without other evidence of their truthfulness, such as the testimony of a witness who had personal knowledge of the transaction.

Entries made by a bank clerk in the usual course of his duty are admissible upon showing that he is dead.

Action on a promissory note for \$500, made by defendant, payable to the order of F. H. Holmes.

The defense was that the note was given as an accommodation note, without consideration, and diverted by the payee. The further facts material to the ruling appear in the opinion.

At Circuit, judgment was entered for plaintiff on a verdict.

The *Supreme Court at General Term* affirmed the judgment without opinion.

The Court of Appeals reversed the judgment.

CHURCH, Ch. J. The only point presented for the consideration of this court is, that the plaintiff failed to prove that it was a *bona fide* holder for value of the note upon which the action was brought. The possession of the note was sufficient *prima facie* to establish this, but when it was proved that the note was given without consideration, and fraudently put in circulation, it was incumbent upon the plaintiff to prove the fact (45 N. Y., 762). It was sought to prove the fact by the president and discount clerk, but these officials did not occupy their respective positions at the time the note was discounted, and could not, therefore, speak from personal knowledge as to some of the facts. Their evidence proved that the note was in the possession of the bank before maturity, that the usual course of business upon discounting a note was for the discount clerk to draw a check upon the president for the amount of the note, less the discount, and for

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the president and person procuring the discount to indorse it. Such a check was produced bearing even date with the note for \$792. If this check had corresponded with the amount of the note (\$500), less the discount, the evidence might have been sufficient to prove the discount, but being for a larger amount it required further proof to show that the avails of this note were included in it.

As the officers of the bank could not speak from personal knowledge, it was necessary to resort to the entries made by the discount clerk. These could only be proved by the clerk making them, as it appeared he was alive and within the state. This rule of authenticating entries of this character has never been departed from in this state. (8 N. Y. [4 Seld], 170, 2 Hill, 531, 537.)*

It is true that the entries were not formally introduced in evidence, but the witnesses were allowed to state substantially what they were and the evidence derived from them was effective to prove the fact. The president and clerk stated that this note and a note for \$300 were discounted and that the check of \$792 was given for the avails, and the amount paid by the bank; but they made the statement from the entries and papers and not from personal knowledge, and this use of the entries without proper verification was error. The rule is a wise one, and we are not at liberty to overlook a departure from it, even if its application is unimportant in this case. The precedent would be injurious.

As the General Term gave no opinion we are not advised upon what ground that court affirmed the judgment. The judgment must be reversed and a new trial granted; costs to abide the event.

All the judges concurred.

Judgment reversed.

Upon the new trial, plaintiff produced a discount register of the bank used at the time of the alleged discounting of the note in suit, which contained entries tending to show that the note was

*Brewster v. Doane, 2 Hill, 537, held that death must be shown. Absence from the jurisdiction is not enough. The contrary is held in some states.

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discounted by the bank on the 31st day of July, 1869; and proved that at that time one H. S. Murray was discount clerk of the bank; that he was since deceased; that it was his business to make the entries, and, in short, that they were made in the usual course of business, and were in the handwriting of the deceased clerk. The entries were then offered in evidence. The court refused to admit them until it should be shown that the entries were correct. The plaintiff duly excepted.

At Circuit, judgment was entered for defendant upon a verdict directed by the court.

The General Term of the Supreme Court reversed the judgment.

DAVIS, P. J. [*after stating the facts*]: It was then shown by a witness who was, at the time of the alleged discount, the cashier of the bank, and afterwards its president, in substance, that at that time, when a note was discounted, the only persons who had anything to do with it were the president and the discount clerk, and all the president would do would be to mark it with the letter "A;" that the discount clerk then would enter it upon the discount register, and either give credit, or deliver a check for the amount. It was proved that the note in suit was marked with the letter "A" by the president of the bank, and that that was the evidence upon which the discount clerk acted in making the discount entries.

The possession of the note by the bank before its maturity was also proved. That fact, however, must be regarded as admitted by the pleadings. The plaintiffs again offered the entries in the discount book, in evidence, and they were rejected by the court. There is nothing in the decision in this case when before the Court of Appeals, as reported in 55 New York, 440, to justify the rejection of the entries. At that time, as is stated in the opinion of the Court of Appeals, it appeared that Murray, the clerk, was alive, and within the state, and it was held that the entries made by him could only be proved by the clerk making them, as it appeared he was alive and within the state. The case is now entirely changed by proof of the fact of the death of the

clerk, at the time of the last trial. "The rule is," says Bronson, J., in *Brewster v. Doane* (2 Hill, 537), "that entries and memoranda made in the usual course of business by notaries, clerks and other persons may be received in evidence after the death of the person who made them. (*Halliday v. Martinet*, 20 Johns., 168; *Butler v. Wright*, 2 Wend., 369; *Hart v. Wilson*, *id.*, 513; *Nichols v. Goldsmith*, 7 *id.*, 160; Cowen & Hill's Notes to Phil. Ev., 674, 676.) And in *Sheldon v. Benham* (4 Hill, 129, 131), where the entries made by the teller of a bank were offered in evidence, the same learned justice says: "It is enough that he acted on this occasion in the usual course of his employment, and being dead, the entries which he made at the time were properly received in evidence. The rule for admitting them is not confined to entries made by public officers." (*Welsh v. Barrett*, 15 Mass., 380.) Where there is any reason for doubt, it is for the jury to say how much the entries prove. This rule is very distinctly recognized by the Court of Appeals in the decision of the case above cited.

It was, therefore, we think, clearly error for the court below to reject the entries. There were, we think, several other errors in the progress of the trial, in the exclusion and striking out of evidence, and in the refusal of the court to submit the case upon any of the questions to the jury; but it is not necessary to consider them in detail.

The judgment must be reversed and a new trial granted, with costs to abide event.

DANIELS, J., concurred; BRADY, J., concurred in the result.

Judgment reversed; new trial ordered; costs to abide event.

Mayor, etc., of N. Y. v. Sec. Ave. R. R. Co., 102 N. Y., 572.

MAYOR, ETC., OF N. Y., v. SECOND AVE. R. R. CO.

New York Court of Appeals, 1886.

[Reported in 102 N. Y., 572.]

In an action to recover the cost of work, the number of days' labor performed being material, a time book kept by a foreman, consisting of entries made not upon his own knowledge of the facts but from the reports of gang foremen—*Held*, admissible in evidence, upon the testimony of the foreman keeping it, that he had correctly entered the facts as reported, and of the gang foremen to the effect that they had correctly reported the facts to the foreman as they existed to their knowledge at the time of making them to the foreman.

An ultimate fact may be proved by showing by a witness that he once knew the details, and communicated them to another person at the time, but has now forgotten them; and supplementing this testimony by that of the person receiving the communication to the effect that at that time he made an entry of the facts communicated, and by producing, as evidence the writing so made.

It seems that the entry must have been made in the ordinary course of business, and that the rule should not be extended, so as to admit a mere private memorandum, not made in pursuance of any duty owing by the person making it, or when made upon information derived from another who made the communication casually and voluntarily, and not under the sanction of duty or other obligation.

Defendants had covenanted with plaintiffs to have and keep in repair the streets in and about the rails of defendant's track, which however they failed to do; and this action was brought to recover the expense incurred by plaintiffs in having the work done.

The action was tried before Mr. Justice Van Vorst, and a jury.

John B. Wilt, a foreman in the department of Public Works at the time the work was done, testified that he had charge of the work, "my duties were to see that the men did the work and that they were supplied with the material; I was not present at the work all day: I called in the morning and in the afternoon; had the men's names in a time book; I marked the time when I found them there.

Q. Are those the books?

A. Yes, sir."

Mayor, etc., of N. Y. v. Sec. Ave. R. R. Co., 102 N. Y., 572.

Defendants counsel objects to the reception of the books.

The Court: "The logical way will be to show what was the work that was done there."

The witness then described the work, adding: "they [the men] worked during these hours [eight hours a day] so far as reported to me by the head pavers when I went around in the morning and the afternoon. * * * I was there sometimes ten minutes, sometimes half an hour * * * I marked the men's names as I saw them." * * *

The testimony of three gang foremen was then given: that they were such in this work; knew the witness Wilt, who took the time of their respective gangs twice each day, morning and afternoon.

Q. Assuming such a thing as this to have occurred,—that after the first roll call any one or more of your men had ceased work and not reported till the time of the second roll call,—is that a circumstance which you would have reported to Mr. Wilt?

A. Always did, sir.

It was further testified that they made a report to the time-keeper [Wilt] when he came around, of the quantity of stone used: and that the amounts were correctly given to him.

The time book was again offered in evidence.

Defendant objected that Wilt had no personal knowledge of the facts purporting to be entered.

By the Court: Q. That is what you call a time book?

A. Yes, sir.

Q. A book of original entries at the time?

A. Yes, sir.

Objection overruled and book received."

In the same way the witness' report (made to his superior at the time of the work) of the quantity of stone used was received.

The pay-rolls were also put in evidence.

At Circuit, judgment was entered for the plaintiff upon a verdict directed by the court.

The Supreme Court at General Term affirmed the judgment.

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The Court of Appeals affirmed the judgment.

ANDREWS, J. [*on the point in question*]: The exception to the admission of the time-book presents a question of considerable practical importance. The ultimate fact sought to be proved in this branch of the case, was the number of days' labor performed in making the repairs. The time-book was not admissible as a memorandum of facts known to Wilt and verified by him. His observation of the men at work was casual, and it cannot be inferred that he had personal knowledge of the amount of labor performed. His knowledge, from personal observation, was manifestly incomplete, and the time-book was made up, mainly at least, from the reports of the gang foremen. The time-book was clearly not admissible upon the testimony either of the gang foremen, or of Wilt, separately considered. The gang foremen knew the facts they reported to Wilt to be true, but they did not see the entries made, and could not verify their correctness. Wilt did not make the entries upon his own knowledge of the facts, but from the reports of the gang foremen. Standing on his testimony alone the entries were mere hearsay. But combining the testimony of Wilt and the gang foremen, there was, first, original evidence that laborers were employed, and that their time was correctly reported by persons who had personal knowledge of the facts, and that their reports were made in the ordinary course of business, and in accordance with the duty of the persons making them, and in point of time were contemporaneous with the transactions to which the reports related; and second, evidence by the person who received the reports that he correctly entered them, as reported, in the time-book, in the usual course of his business and duty. It is objected that this evidence taken together, is incompetent to prove the ultimate fact, and amounts to nothing more than hearsay. If the witnesses are believed there can be but little moral doubt that the book is a true record of the actual fact. There could be no doubt whatever, except one arising from infirmity of memory or mistake, or fraud. The gang foremen may by mistake or fraud, have misreported to Wilt, and Wilt may either intentionally or unintentionally have made entries not in accordance with the reports of the gang

foremen. But the possibility of mistake or fraud on the part of witnesses exists in all cases and in respect to any kind of oral evidence. The question arises, must a material, ultimate fact be proved by the evidence of a witness who knew the fact and can recall it, or who, having, on personal recollection of the fact at the time of his examination as a witness, testifies that he made, or saw made, an entry of the fact at the time, or recently thereafter, which, on being produced, he can verify as the entry he made or saw, and that he knew the entry to be true when made, or may such ultimate fact be proved by showing by a witness that he knew the facts in relation to the matter which is the subject of investigation and communicated them to another at the time, but had forgotten them, and supplementing this testimony by that of the person receiving the communication to the effect that he entered at the time, the facts communicated and by the production of the book or memorandum in which the entries were made. The admissibility of memoranda of the first class is well settled. They are admitted in connection with, and as auxiliary to, the oral evidence of the witness, and this, whether the witness, on seeing the entries, recalls the facts, or can only verify the entries as a true record made or seen by him at, or soon after the transaction to which it relates. (*Halsey v. Sinsebaugh* 15 N. Y. 485; *Guy v. Mead*, 22 *id.*, 462.)

The other branch of the inquiry has not been very distinctly adjudicated in this state, although the admissibility of entries made under circumstances like those in this case was apparently approved in *Payne v. Hodge* (71 N. Y., 598). We are of opinion that the rule as to the admissibility of memoranda may properly be extended so as to embrace the case before us. The case is of an account kept in the ordinary course of business, of laborers employed in the prosecution of work, based upon daily reports of foremen who had charge of the men, and who, in accordance with their duty, reported the time to another subordinate of the same common master, but of a higher grade, who, in time, also in accordance with his duty, entered the time as reported. We think entries so made with the evidence of the foremen that they made true reports, and of the person who

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made the entries, that he correctly entered them, are admissible. It is substantially by this method of accounts, that business transactions in numerous cases are authenticated, and business could not be carried on and accounts kept in many cases, without great inconvenience, unless this method of keeping and proving accounts is sanctioned. In a business where many laborers are employed, the accounts, must, in most cases, of necessity, be kept by a person not personally cognizant of the facts, and from reports made by others. The person in charge of the laborers knows the fact, but he may not have the skill or, for other reasons, it may be inconvenient that he should keep the account. It may be assumed that a system of accounts based upon substantially the same methods as the accounts in this case, is in accordance with the usages of business. In admitting an account verified, as was the account here, there is little danger of mistake, and the admission of such an account as legal evidence is often necessary to prevent a failure of justice. We are of opinion, however, that it is a proper qualification of the rule admitting such evidence, that the account must have been made in the ordinary course of business, and that it should not be extended so as to admit a mere private memorandum, not made in pursuance of any duty owing by the person making it, or when made upon information derived from another who made the communication casually and voluntarily, and not under the sanction of duty or other obligation. The case before us is within the qualification suggested. In *Peck v. Valentine* (94 N. Y., 569), the memorandum there admitted was not an original memorandum but a copy of a private memorandum made by an employé of the plaintiff for his own purposes; and not in the course of his duty, or in the ordinary course of business. The original memorandum was delivered by the one who made it, to the plaintiff, who lost it, but testified that the paper produced and received in evidence was a copy. The person who made the original memorandum was unable to verify the copy. The court held that the copy was improperly admitted in evidence. The decision in *Peck v. Valentine* rests upon quite different facts than those in this case.

In respect to the admission of the account of material, we

think that part of the account based upon the reports of Madden was admissible on the same grounds upon which we have justified the admission of the time-book. Madden, in substance, testified that he knew the facts and properly reported them, and Wilt testified that he entered them as reported. The part of the account of materials, the items of which were furnished by Coughlan, was not strictly admissible. Coughlan does not appear to have had personal knowledge of the quantity of stone delivered on his part of the work, but took the count of the carman, and his reports to Wilt were based upon the reports of the carman to him. The carman was not called, and the evidence of Wilt and Coughlan was mere hearsay. If the attention of the court had been called by the defendant to this part of the account, and objection had been specifically taken to the items entered upon the reports of Coughlan, the objection would, we think, have been valid. But the objection was a general objection to the whole account. It was clearly admissible as to the items reported by Madden, and, we think the general objection and exception is not available to raise the question as to the admissibility of the items entered on the report of Coughlan, independently of the others. The whole amount of the materials embraced in the recovery was small, and, we think, no injustice will be done by affirming the judgment.

The judgment should, therefore, be affirmed.

All concur.

Judgment affirmed.

CHURCHMAN v. LEWIS.

New York Court of Appeals, 1866.

[Reported in 34 N. Y., 444.]

What evidence is insufficient to allow a memorandum of a transaction to be received.

Owen Churchman sued Lewis and Beardsley, upon a draft for \$5,000, drawn by defendants in favor of Frederick C. Mills, upon Suydam, Sage & Co.

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The defense was usury; that the draft was drawn for the accommodation of Suydam, Sage & Co., and purchased by the plaintiff, of Ward & Co., as agents of the drawees, at a greater rate of discount than seven per cent. per annum.

Upon the trial, the defendants, to establish usury, called the three members of the firm of Ward and Co. and their clerk, Joseph H. Taylor, as witnesses and each one testified that he could not identify the paper [the draft] in question, and did not know that it had ever passed through the hands of their firm, and they knew nothing about the rate of its discount. They further stated, as their general course of business that, when paper was sold, a statement was made to one of the clerks, who gave a copy to the party for whom the draft was sold, and made a memorandum in the books.

The following statement in the handwriting of Mr. Taylor, the clerk, was read in evidence by the defendants against objection:

“WARD & Co.

Suydam, Sage & Co.....	\$5,000 00	122 days,	\$101 67
Less interest $12\frac{1}{2}$; com., $\frac{1}{4}$..	215 84		101 67
			<hr/>
Check herewith.....	\$4,784 16		\$203 34
$\frac{1}{4}$ com.....			12 50
			<hr/>
			\$215 84

LEWIS & BEARDSLEY,

MESSRS SUYDAM, SAGE & Co.

May 24th, 1850.”

The Supreme Court at Special Term entered judgment for defendant.

The Supreme Court at General Term affirmed the judgment without opinion.

The Court of Appeals reversed the judgment.

HUNT, J. [*after stating facts*]: This was supposed to have been a copy from the books of Ward & Co. It was not, how-

ever, proved to have been such, the witness Taylor, testifying that he had not compared it with the entry in the books; that it was in his handwriting, but he did not remember from what the memorandum was taken.

The defendants claimed that this entry showed that the draft referred to in the entry was discounted at the rate of twelve per cent. per annum and that the holders received only \$4,784.16 for their draft of \$5,000, having only 122 days to run; and that the draft in suit was the one referred to in the entry. Although the entry is, in some respects, unintelligible without explanation, and although the plaintiff's name is not mentioned in it, it did tend strongly to make that proof, and the jury must have considered it as satisfactory, as there was no other evidence to establish the usury.

On what principle was it competent? It was the written hearsay statement of Joseph H. Taylor, that the draft in the statement referred to was sold at the discount therein stated. Taylor testifies that he did not himself make the transaction of the discount of the draft, and that he had no personal knowledge of it; that he did not know who told him to make the entry, and that he had no knowledge whatever of the facts, aside from the memorandum. He supposed the entry to have been made by directions from one of the firm; that such was the general instructions of the firm.

The evidence was incompetent. Suppose that either member of the firm or all of them had stated to him orally the precise facts set forth in the entry. Would his recital of such statement have been evidence against the plaintiff? Would it be competent, to go still farther, and to hold that Taylor's statement (not his testimony) of the Ward's statement to him would be competent? I am aware of no principle which would justify Mr. Taylor's evidence of such statement if he distinctly remembered it, much less his written recital of it, when at the same time he could not testify that he had ever been so informed by them.

The statement gains no additional competency by having been written in the books of Ward & Co. The parties acting in the transaction were all living and competent to testify, and all did testify on the trial. The statement was not within the excepted

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class of subjects which may be proved by hearsay, such as birth, age, pedigree, etc.; nor was it a part of the *res. gestæ*, as the statement is expressly stated to be a subsequent record of the supposed transaction; nor could it come under the head of a public document or an official certificate. It was a pure simple hearsay statement, made without the knowledge of the plaintiff, by parties not acting for him, and in a business in which he had no interest or control, and then read from an uncomparred copy of such statement, without explaining the absence of the original, or more properly, in defiance of the presence of the original in an adjacent street.

A new trial should be granted.

Judgment accordingly.

NOTE.—In *Payne v. Hodge*, 7 Hun, 612 (affd. without opinion in 71 N. Y., 598), an action for the value of services, etc., plaintiff offered in evidence his books containing contemporaneous memoranda, made by him, of the time of the workmen in his employ on the house in question, who testified that they gave their time correctly to the plaintiff, saw him enter it in the books and settled with him according as given.

GILBERT, J., at General Term said on this point: The evidence was clearly sufficient to establish the correctness of the plaintiff's account. The plaintiff testified that he made the entries in accordance with statements made to him by other witnesses, and the latter testified that such statements were true. This is all that the law requires. Such evidence is not necessarily upon hearsay, which is very properly condemned in *Gould v. Conway* (59 Barb., 361). But the plaintiff testified that he entered the facts as given to him, and the other witnesses proved that the facts were correctly given to the plaintiff and that he entered them. It can make no difference how the truth of the facts stated in the entry is proved, whether by the one who made the entry or by the one who gave him the facts which he entered. Nor is an entry incompetent because it is of a fact not within the personal knowledge of the person who made it; it is enough if it appears that the entry rests upon knowledge and not hearsay, and is proved to have been correctly made.

In *Gould v. Conway*, 59 Barb., 355, plaintiff suing for the price of goods sold, were allowed to put their account books in evidence containing original entries made by their bookkeepers who did not, however, make the sales charged, but only entered sales reported to them by salesmen, and usually noted the initials of the salesman in the entry. The salesman called did not remember the sales made.

Held, error to receive the books. JOHNSON, J., after referring to the cases on this question, said:

They are all, or nearly all, cases where the witness who made the me-

memorandum, knew, at the time he made it, that the matter therein stated was true. In such a case it has been repeatedly held in this state, since the decision in *Merrill v. The Ithaca & Owego R. R. Co.* (16 Wend., 586), where the witness who made the memorandum was unable to recollect the facts contained in it at the trial, but was able to state that he knew the memorandum stated what was true when he made it, that the memorandum so made might be received, in connection with the oral testimony of the witness, as evidence of the facts therein stated. But here the witness making the memorandum had no knowledge of the fact, except what another told him, and the one who told him did not see the memorandum at the time it was made, and consequently cannot state that he knew it was truly made at the time. It comes just to this, that the memorandum is used to prove that what another person told the one who made it was true. This is going a long stride beyond any adjudged case, and would be a most dangerous rule to adopt. It would be little short of hearsay upon hearsay. I am of the opinion that in a case of this kind, if it had appeared that the salesman who reported the sale had seen the charge made by the bookkeeper, and knew, then, that it was correctly made, it might be introduced as a memorandum, in connection with the testimony of the salesman, either with or without the testimony of the bookkeeper, the salesman having forgotten the fact that such sale had been made by him. I do not find any decision going quite so far, but it seems to me that it falls within the principle of allowing memoranda of facts once known, and committed to writing, but forgotten by one of the actors in the transaction, to be used in evidence to supplement his memory, or in the place of it. The question as to who made the memorandum is of much less importance than the question whether the person who saw it made, knew at the time, personally, that the fact existed and was there truly recorded. Of course if the witness did not make the memorandum, in such case, it should be clearly and unmistakably identified by him as the identical one he saw made, or at least that he saw and understood it when the fact of which he then had personal knowledge was clearly within his recollection. But here the memorandum is quite too far removed from the transaction which it is sought to prove.

I think no one would claim that the bookkeeper would be allowed to testify to what the salesman had told him in regard to a sale, where the salesman could only say that if he told the bookkeeper so, it was true; but that he had forgotten both the fact, and the narration of it to the bookkeeper. That is just what we have here; the salesman, who alone knew the fact, if it existed, has forgotten both the sale, and the report of it to the bookkeeper; all he can say is, that he reported sales truly, and none falsely.

Then comes the bookkeeper, who can only say that the entry is in his handwriting, and that he knows he recorded accurately what the salesman reported. So it all comes back upon the memorandum alone, to prove that the sale was made and the indebtedness incurred as the salesman said it was. This is quite too loose. But the ruling upon the trial goes

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even farther than this. The books, or the entries therein, were used as evidence of the correctness of charges which had the name of no salesman attached, and in regard to which there was no evidence other than the entry itself. The bookkeeper did not pretend to know anything about the fact of the sale, and did not know even by whom it was reported. In regard to one of the items, he stated that it was "probably" reported to him by one of the plaintiffs, and that was all he could state. In regard to two items, which the books or entries were used to establish, there was no evidence, except that they were in the handwriting of a bookkeeper who had gone away, and the testimony before referred to, of one of the plaintiffs, that at some time he had given similar articles to one of his boys in the store to deliver to the defendant.

My conclusion upon the whole case is, that the books, as such, were altogether incompetent, and that the evidence was wholly insufficient to authorize the entries in question therein to be received or read in evidence as memoranda of the transactions to which they related.

In *Shear v. Van Dyke*, 10 Hun, 528, one question litigated was how many loads of hay plaintiff had gathered under a contract with defendant. A witness for plaintiff who aided in taking in the hay, was asked by plaintiff's attorney, how many loads were taken in on an occasion specified. He answered, that he could not now remember, but that he knew at the time, and then told the plaintiff. The plaintiff was then called, and was allowed, against objection, to state that the number of loads given him by the witness was fourteen.

Held, to have been properly admitted, *BOCKES, J.*, saying: "I am inclined to the opinion, contrary to my first impression, that this evidence was admissible. The witness noted the number of loads taken in at the time, and, as he stated, gave the number truly to the plaintiff. Now, the latter might state the number so sworn to have been given him. The evidence sought from him was original evidence. The question was as to the declarations made to him; not as to its truth or falsity. In this view, it was not hearsay evidence. Had the witness given the plaintiff a memorandum of the loads at the time, and had he sworn that the memorandum so furnished was correct, the plaintiff then might have produced and verified the memorandum by his own oath. It has been repeatedly held that when a witness testifies that he made a memorandum correctly at the time the event occurred, but was unable to recollect the fact contained in it when examined in regard to the transaction, the memorandum may then be received in evidence of the fact therein stated. So, in *Payne v. Hodge* (14 S. C., N. Y.) [7 Hun], 612, the plaintiff testified that he made entries in accordance with statements made to him by other witnesses, and the latter testified that such statements were true; the evidence was held to be admissible. Now, in the case in hand, the fact sought to be proved comes verified by the oath of witnesses in a way that renders it definite and certain. Nor does it rest at all on any statement unsupported by a sworn witness.

LEARNED, P. J. (dissenting), was of the opinion that the propriety of admitting such evidence depends largely upon the fact that evidence thus given was *committed to writing*.

The rule as laid down by BOCKES, J., however, received some sanction in *Dunn v. James*, 62 How. Pr., 307; *affd.* in 82 N. Y., 642, without opinion; but it was also held that the objection had been waived in that case.

In *Fisher v. Mayor of N. Y.*, 67 N. Y., 73, the defendant claimed, as a set-off, an unpaid assessment upon plaintiff's premises, but on the trial no order of confirmation was produced, and it was admitted that no such order could be found in the clerk's office. To prove the making of the order, among other things, a copy of an entry in the official register of the corporation counsel, at the time, was admitted in evidence, as follows: "Widening and extending Centre street; Charles Dusenbury, Abraham Dally, John B. Thorpe, 1835, June 6. Commissioners appointed, 1837, June 4. Report confirmed."

ANDREWS, J., [*on the point said*]: Entries made by third persons in the usual course of professional employment contemporaneously with the transaction recorded, are admissible to prove the fact stated after the death of the person by whom the entry was made (*Doe v. Tinford*, 3 B. & Ad., 898; *Brewster v. Doane*, 2 Hill, 537). The entry by an attorney in his register of the making of an order or decree in a proceeding conducted by him, is admissible within this rule. The order or decree is the act of the court, but it is procured upon the application of the attorney, and the fact of obtaining it is a part of the history of the proceeding, which properly and usually is inserted in the register. There is no absolute duty resting upon an attorney to make such an entry, but this is not essential, it is sufficient if the entry was the natural concomitant of the transaction to which it relates, and usually accompanies it. (1 Greenl. Ev., § 115, *Leland v. Cameron*, 31 N. Y., 115). The facts and circumstances proved independently of the entry, rendered it probable that an order of confirmation was made, and in connection therewith, the original entry of the corporation counsel, was after his death, admissible secondary evidence of the fact. But the entry admitted in this case was not the original entry, and it was not shown that the person who made the entry was dead. On both grounds the evidence was incompetent.

Brennan v. Hall, 131 N. Y., 160.

BRENNAN v. HALL.

New York Court of Appeals, 1892.

[Reported in 131 N. Y., 160.]

In an action to determine the ownership of a mortgage, where it appeared that the deceased to whom it was assigned and in whose possession it was found, claimed no beneficial interest in the security,—*Held*, proper to exclude an entry made in his handwriting tending to show ownership by one of the claimants.

The rule stated, as to admission of entries and declarations made by persons since deceased, against their interests when made.*

Plaintiff sued as administrator of Mary H. Jarvis to recover the avails of a mortgage assigned to and found in possession of defendant's testator, W. A. Hall, at the time of his death. Plaintiff alleged that the mortgage was assigned to said Hall under a parol agreement that he would assign it to Mary H. Jarvis whenever she wanted it.

Upon the trial the defendants did not claim that Hall at the time of his death, or at any prior time, owned or had any interest in the mortgage. Nor did they claim any title to or interest in the mortgage as executors and trustees under the will of Hall. While in their answer they did allege that the mortgage was the property of Hall at the time of his death, and as such came to them, and that they were entitled to the proceeds thereof, upon the trial they alleged that Hall took the assignment of the mortgage in trust for the benefit of Sarah A. Jarvis, the mother of Judson Jarvis. Some time after the death of Hall the mortgage was found in an envelope in the bank where it had been deposited by Hall, and on the envelope, in his handwriting, were these words: "All the papers, bond and mortgage, assignment, etc., are the property of S. A. Jarvis." The envelope also contained this paper, which was in the handwriting of Hall:

"NEW YORK, October 8, 1881.

"The bond and mortgage assigned to me by Prince & White-ly, for the sum of \$20,400, does not belong to me, the money to pay for said mortgage being furnished by Mrs. Sarah A. Jarvis,

* See on this subject, Lyon v. Ricker, 141 N. Y., 225.

Brennan v. Hall, 131 N. Y., 160.

and the same is to be reassigned to her, or whom she may designate, and I hereby bind myself, my heirs or assigns, to make said assignment. W. A. HALL."

The defendants offered the paper and indorsement in evidence, claiming that the evidence was competent because they were written declarations and entries made by Hall, now deceased, which were against his interest when made. The trial judge excluded the evidence, and defendants excepted.

The Special Term gave judgment for the plaintiff.

The General Term of the Supreme Court affirmed the judgment.

The Court of Appeals affirmed the judgment.

EARL, Ch. J., [*on this point said*]: Defendants offered to put in evidence the indorsement upon the envelope and the other paper for the purpose of showing that the mortgage actually belonged to Sarah A. Jarvis and was held by Hall in trust for her. It was claimed that the evidence was competent because these were written declarations and entries made by Hall, then deceased, which were against his interest when made. There is a well-recognized exception to the rule which excludes hearsay evidence, by which declarations and entries made by persons, since deceased, against their interests when made, are allowed. Such declarations and entries are received because of the extreme improbability that the person making them would fabricate or falsely make them against his own interests. (1 Greenleaf's Ev., § 147 *et seq.*) To bring the declarations and entries in such a case within the exception, the fundamental requirement is that they should at the time be against the interests of the person making them. The exception does not apply here because these statements of Hall were, when made, against the interests of Mary H. Jarvis and not against his interest. He never at any time claimed to hold the mortgage as his own, and never in fact owned it, and the defendants, upon the trial, did not claim he ever owned it, or that they had any interest in it. If these statements were allowed as evidence they would simply tend to show that the money in controversy belonged to Sarah A. Jarvis, and not

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to Mary H. Jarvis, and hence they are not within the reason of the exception, and it is confidently believed that no authority can be found holding such statements competent evidence under such circumstances.

When a person makes statements or entries impairing, qualifying or limiting his title to property in his possession, then, in a litigation after his death when the title to the same property comes in question, such statements or entries may be given in evidence, and the fact that they were against the interest of the person making them, stands in the place of an oath, and gives nearly if not quite the same assurance of veracity. So if either of the parties to this action were here asserting the title of Hall to the mortgage, and claiming under, through or from him, then his statements made in derogation of his title and thus against his interest could be given in evidence against such party, and the rule referred to could have no other application to such a case.

We are, therefore, of opinion that the trial judge did not err in excluding these written statements made by Hall.

LIVINGSTON v. ARNOUX.

New York Court of Appeals, 1874.

[Reported in 56 N. Y., 507.]

A public officer's memorandum of a matter pertaining to his official duty, and against his interest, such as a usual receipt, though not required by law, is, after his death, competent evidence, not only of the fact which was against his interest, but of any incidental but material fact mentioned in it,—*e. g.*, of the date of the transaction.

Privy between the officer and the party against whom it is offered need not appear.

This case, which was ejectment for land which had been sold under execution, depended upon the question whether there was a redemption, by the judgment debtor, from the sale on the Brinckerhoff judgment, reported in 15 Abb. Pr. N. S., 158.

To establish such redemption the plaintiff proved a receipt, signed by the sheriff, Westervelt, in his official character, dated April 10th, 1849, entitled In the action of Brinckerhoff v. Price,

by which the sheriff acknowledged that he had received from Francis Price, the defendant in the action, \$72.05, to redeem property sold upon execution therein, April 13th, 1848, the said amount being (as stated in the receipt) the purchase money, at 10 per cent. interest, for all the property sold by the sheriff on that day on the execution.

Below the receipt, on the same paper, was a memorandum of Mr. Adriance, an attorney, indicating that he had paid the sheriff the money mentioned, and taken the receipt for Francis Price.

It was admitted that the sale on the execution embraced several parcels of land, in addition to the premises in question, represented by fifteen separate certificates of sale, and that the aggregate amount of the purchase money, including ten per cent. interest from the time of the sale to April 10th, 1849, was the sum expressed in the receipt. Westervelt, who was sheriff during the years 1848 and 1849; his undersheriff; Price, the judgment debtor; and Adriance had all died several years before the trial.

Plaintiff, after having proved the death of the sheriff, called Edgar Ketchum to prove the written receipt of the redemption money paid by Price to the sheriff.

The witness, being cross-examined, testified as follows:

"I do not know personally anything of the particular transaction spoken of in this paper.

Q. At the time this paper bears dates did Adriance act as attorney for Francis Price?

A. He occasionally acted as his attorney.

Q. Do you know whether it was Adriance who acted in the settlement in behalf of Francis Price?

A. Yes; Mr. Isaac Adriance.

Plaintiff's counsel offered the paper in evidence.

Defendant objected.

Court: What is this paper that plaintiff's counsel offers?

Plaintiff's Counsel: This is the certificate of redemption, sir.

Defendant's Counsel: I object to the admissibility of the paper on the ground; first, No declaration of the sheriff is evidence unless made as is provided by statute, and when it is made

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as provided by statute, to be competent as proof, it must conform to the requirements of the statute. There is no paper in existence that is competent evidence, and they have got to prove the fact; second, It is not in the form required by the Act of 1847; third, It is not acknowledged or proved as is required to be by that law to be *prima facie* evidence; fourth, It does not truly state the facts transpiring before the sheriff at the time of payment; and fifth, It is incompetent to prove a redemption.

Court: The only question is, was there such payment or redemption? It appears by the paper, signed by the person authorized to receive the amount, that a certain sum corresponding to the amount due, and referring directly to these proceedings under execution was paid. The party is dead, and I think the paper itself is evidence to go to the jury to show that payment was made and that statute complied with. Therefore, I shall rule that the paper be admitted and give you the benefit of an exception.

Defendant's counsel duly excepted.

Plaintiff's Counsel: It is admitted that Francis Price died several years before the commencement of this action."

Judgment was entered for plaintiff.

The Court of Common Pleas at General Term affirmed the judgment.

The Court of Appeals affirmed the judgment.

ANDREWS, J. [*on this point, said*]: By the Revised Statutes, payment, on redemption by the judgment debtor, may be made to the purchaser, his personal representatives or assigns, or "to the officer who made the sale, for the use of the purchaser." (§ 45.) Where the sale is made by a deputy of the sheriff, either the sheriff or the deputy is the officer who made the sale, within the purview of this statute, and payment may be made to either. NELSON, J., in *The People v. Becker* (20 Wend., 602), in respect to a redemption by creditors, where the premises were sold by a deputy and payment was made to the sheriff, said: "Both made the sale; one in fact, and the other in judgment of law.*"

* The subject of sale and redemption is now regulated by Code Civ. Pro., § 1430, etc.

The receipt, if competent evidence established *prima facie* all the facts essential to constitute a redemption; to wit., the payment by the judgment debtor, within a year after the sale, to the officer by whom it was made, of the amount bid, with interest at the rate prescribed by statute. The receipt was competent common law evidence of the facts stated in it. The Revised Statutes did not require the sheriff to give the judgment debtor, who redeemed, a certificate or other evidence of the fact of redemption. But he was a public officer, acting under an official oath, invested by law with authority to receive, for the use of the purchaser, the money paid on redemption. Although giving a receipt on payment being made was not strictly an official act, it was a proper and reasonable one, in the ordinary course of business, and within the general scope of his authority and duty; and the giving of a receipt, where no payment, in fact, was made, would be a gross dereliction of duty, calculated to defraud the purchaser, and would subject the officer to the charge of official misconduct.

Entries and memoranda, made by persons, since deceased, in the ordinary course of professional and official employment, are competent secondary evidence of the facts contained in them, where they had no interest to misrepresent or misstate them. (1 Greenl. Ev., § 115; *Nichols v. Webb*, 8 Wheat., 326.) They are admitted from necessity. In *Leland v. Cameron* (31 N. Y., 115), the entry by an attorney in his register, in the proceedings in the action, of the issuing of an execution which could not be found, was held, the attorney being dead, to be competent evidence of the fact that the execution was issued. Nor is it necessary, as the defendant claims, that the entry should have been made in a book, to make the evidence admissible. No cases have been cited which proceed upon this distinction, and there is no principle upon which it can be supported. (See *Porter v. Judson*, 1 Gray, 175; *Doe v. Turford*, 3 B. & Ad., 898).

The receipt given by the sheriff, in this case, related to a fact known to him, and to which, if living, he would have been competent to testify; it was given in conformity with the usual practice in transactions involving the payment of money, and all the parties concerned in the matter to which it relates are dead.

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The general fact of redemption shown by the receipt is corroborated by the other facts in the case. The long delay of the purchaser in procuring a deed from Westervelt who was living as late as 1860 ; the small amount for which the land was sold compared with its real value ; the holding under Price's title of these and the other premises sold on the execution, for eighteen years, no claim at any time so far as it appears, having been made that the other parcels of land sold at the same time had not been redeemed nor any assertion of right to these premises by the purchaser until the sheriff's deed was executed, are circumstances supporting the conclusion that a redemption was made. It is not necessary to hold that receipts of public officers for money paid to them, which they are authorized to receive, are primary evidence of the fact of payment ; but they are competent secondary evidence, after the officer's death, within the general principle upon which entries and memoranda of persons, since deceased, are admitted. (*Harrison v. Blades*, 3 Camp., 457 ; *Jones v. Carrington*, 1 C. & P., 327 ; *id.*, 497 ; *Lessee of Clugage v. Swan*, 4 Bin., 150 ; 1 Phil. Ev. [3d ed.], 299, and cases cited).

The receipt was admissible on another ground. The officer thereby charged himself with the money, and rendered himself accountable for it to the creditor.

It was an admission against his interest, made in respect to a matter pertaining to his official duty. Written memoranda, made under such circumstances, may reasonably be assumed to be truthful, and are evidence after the death of the party who made them, as well of the fact against his interest, as of the other incidental and collateral facts and circumstances mentioned, and are admissible irrespective of the fact whether any privity exists between the person who made them and the party against whom they are offered. (*Doe v. Robson*, 15 East., 52 ; *Davies v. Humphreys*, 6 M. & W., 153 ; *Percival v. Nanson*, 7 Exch., 1 ; *Marks v. Colnaghi*, 3 Bing., N. C., 408 ; *Hingham v. Ridgway*, 1 East., 109.) The general presumption is that an instrument was made at its date. (*Costigan v. Gould*, 5 Den., 290.) Some exceptions exist which it is not now material to notice. (*Houliston v. Smyth*, 2 C. & P., 22 ; *Roseboom v. Bellington*, 17 J. R., 182.) The date

of the payment in the receipt was not collateral to the main purpose for which it was given. The time of payment was material, as the redemption must be made within the year, and the true date of the transaction would naturally be stated in it. The memorandum on the back of the receipt, indicates that the payment was made by Adriance for Price. Adriance had acted as his attorney, and there was evidence, aside from this indorsement, that he acted in making the redemption for him. It is not necessary that a redemption should be made by the debtor in person; many circumstances may prevent it, and it would be a very inconvenient construction of the statute to require it. If the receipt is alone considered, it shows the payment was, in fact, made by Price; admitting the memorandum, it shows that Adriance made it for him, and as there is nothing to contradict the fact of his agency, it must be assumed.

The receipt was competent evidence for another reason. By the fifth section of Chapter 410 of the Laws of 1847, it is made the duty of the officer making a sale of real estate on execution, or any other person who may lawfully act in his behalf, to execute to the person making a redemption, a certificate truly stating all such facts transpiring before him, as shall be sufficient to show the redemption.

The sixth section provides for the proof or acknowledgment of the certificate, and for recording it in the clerk's office of the county where the lands are situate, and declares that "such certificate, or the record thereof or a duly authenticated copy of such record, shall be received in all courts and places as *prima facie* evidence of the facts therein stated." Some of the sections in the act of 1847 relate to redemptions by creditors exclusively, but the language of the fifth and sixth sections is general, and applies, we think, to redemptions made either by the judgment debtor or by creditors. The receipt states all the facts necessary to show a redemption, and is in substance a certificate within the act of 1847, and as such was evidence of the facts stated in it under the statute. The omission to have the certificate proved or acknowledged and recorded is immaterial as between these parties.

Judgment affirmed.

Note on Testimony by the Writer.

NOTE ON DIRECT TESTIMONY BY THE WRITER.

It is not necessary to call the writer as a witness to prove a disputed signature, nor to account for his absence, but its genuineness may be proved by any other competent evidence.

Abbott's Trial Ev., p. 393, § 6.

Royce *v.* Gazan, 76 Ga., 79.

A supposed or alleged writer may be asked directly: "Did you write that, or sign that"; or, "Did you authorize anyone to sign that for you?" *

Com. *v.* Kepper, 114 Mass., 278.

* These questions were held unobjectionable both in form and substance in the Massachusetts case, where we may suppose that the objection was that both were leading, and the second one called for a conclusion.

Bronner v. Loomis, 14 Hun, 341.

BRONNER v. LOOMIS.

New York, Supreme Court, 1878.

[Reported in 14 Hun, 341.]

Where the genuineness of a signature is in controversy, the party whose signature it purports to be, may, when testifying in his own behalf, be asked by the adverse party to sign his name in the presence of the court and jury; and a signature thus made may be put in evidence by such adverse party for the purpose of comparing it with the signature in question.

It seems, that the party asserting that his own name has been forged, cannot, at his own instance, make his own signature and then put it in evidence for the purpose of such comparison.

Plaintiff sued on a promissory note; and defendant alleged that the signature was a forgery.

TALCOTT, P. J., said: The only exception to which our attention is called by the counsel for the defendant is that stated at the close of the case, as follows: "A signature made by the defendant upon trial, at the request of the plaintiff's counsel, offered in evidence, written by the defendant; objected to by defendant's counsel and objection overruled, and exception taken by the defendant." The defendant's counsel undertakes to sustain his objection and exception by a reference to the general rule of law as settled in this state, that when the question is upon the genuineness of a signature, you cannot give in evidence other instruments which are genuine to enable the jury to compare the signatures thereto with the one which is disputed. It is true, this is the general rule as adopted in this state. This rule seems to be founded on two reasons: 1. Because, in the absence of such a rule, there would be a great temptation to make an unfair selection of signatures. 2. Because the introduction of a large number of signatures would create a number of collateral issues, and thus tend to burden the case with irrelevant questions and to embarrass the jury. (*Van Wyck v. McIntosh*, 14 N. Y., 439; *Greenl. Ev.*, § 580.)

But, where the signature is made by the person whose signature is in controversy, in the presence of the court and jury, at the request of the adverse party, or where such a signature is

obtained on the cross-examination of the witness, the reasons for the application of the rule do not exist. The party asserting the forgery cannot, upon the trial, make his own signature, and then offer the signature so made in evidence for the purpose of comparison with the controverted signature for obvious reasons; (*King v. Donahoe*, 110 Mass., 155); but, if the opposite party chooses to take the risk, we think a signature thus made may be offered in evidence by the latter, for the purpose of comparing it with the signature in question. (*Greenleaf's Ev.* [13th ed.], § 581, note. *Taylor on Ev.*, § 1669, and note; 1 *Wharton on Ev.*, § 706; *Chandler v. Le Barron*, 45 Me., 534; *Roe v. Roe*, 40 Super. Ct. Rep. [Jones & Spencer], 1; *Hayes v. Adams*, 2 Supm. Ct. [T. & C.], 593; *Doe v. Wilson*, 10 Moore's Priv. Council Cases, 202.)

In the case of *Doe v. Wilson*, last cited, which was decided by the English Privy Council in 1857, the court, in its opinion, says: "Their lordships have no doubt that, if on trial at *nisi prius*, a witness denies his signature to a document produced in evidence, and, upon being desired to write his name, has done so in open court, such writing may be treated as evidence in the case and be submitted to a jury, who may compare it with the alleged signature to the document." (See, also, as bearing upon the question, *Birch v. Ridge*, 1 Foster & Finlason, 270 and note; *Cresswell v. Jackson*, 2 *id.*, 24; *Cobbett v. Rilminster*, 4 *id.*, 490, and note.)

We think the referee committed no error in allowing the signature to be introduced in evidence, under the circumstances in this case. The question of fact passed upon by the referee was upon conflicting evidence of the force and effect of which he was the judge, and his finding cannot be disturbed.

NOTE.—In *Williams v. Riches* 77 Wis., 569; s. c., 46 Northwest Rep. 817, it was held *not error* to refuse to compel a witness to rewrite in presence of the jury an endorsement which she claims to have made, especially where the witness testified that she made the endorsement when a child and that since then her handwriting had very much changed.

In *Allen v. Gardner*, 44 Kan., 337; s. c. 27 Pacific Rep., 982, it was held *not reversible error* to permit a witness against objection to write his signature in the presence of the jury for their inspection and comparison with a chattel mortgage which purported to have been executed by the witness, where the adverse party on cross-examination also asked the witness to write his name and then offered the signature in evidence.

Hammond v. Varian, 54 N. Y., 398.

HAMMOND v. VARIAN.

New York Commission of Appeals, 1873.

[Reported in 54 N. Y., 398.]

A witness who has seen a person write his name once, and one who has never seen him write, but has held his note, acknowledged and conceded by him to be genuine, are each competent to testify to his opinion and belief of the genuineness of his signature.

Where the defense of forgery of his name is set up by a joint maker of a note, evidence is competent that he had theretofore recognized the validity of other like joint notes purporting to be, but not really signed by him, after knowledge that the signature was not his, in connection with evidence that his name was so signed by the same joint maker, and for the purpose of showing an implied authority to such other joint maker to sign his name.

Plaintiff sued father and son on a note purporting to have been made by them jointly.

The son was in business as member of a firm. The note sued on was given for the price of a horse bought by the son. Plaintiff relied on evidence that the father actually signed the note, and also on evidence that the father had authorized the son to sign notes to raise money in connection with the son's partnership business.

Upon the trial John Buckley was called by plaintiff and asked by plaintiff's counsel the following questions :

Q. "Have you seen him write" (meaning defendant Varian)?

A. Yes, sir; I have seen him write his name.

Q. From your knowledge of his handwriting, is that his signature?

Defendant's counsel objected on the ground that the witness had not shown himself sufficiently acquainted with the defendant's handwriting. Objection overruled, evidence admitted, and exception taken, and the witness answered: "Judging from what I have seen of his writing, I should judge it was."

Sinclaire Dayton, was also called by plaintiff and was asked by plaintiff's counsel the following questions:

Q. "Did you ever see Allan C. Varian write? A. I never have.

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Q. Have you ever held any notes which he has paid to you?
A. Yes, sir.

Q. More than one? A. I think not but one, of \$100.

Q. From your knowledge of his handwriting would you think that to be his signature?

Defendant's counsel objected on the grounds that it was incompetent and improper, and that the witness had not shown himself sufficiently acquainted with the handwriting of the defendant to testify as to its genuineness, and that he was wholly incompetent to testify thereto, for the reason that he had never seen the defendant write.

Objection overruled and exception taken.

The witness answered: 'I see nothing why it does not, in every way, look like the signature to the note he gave me.'

Q. You judge it to be his handwriting? A. Yes, sir."

At Circuit, plaintiff had judgment upon a verdict.

The Supreme Court at General Term affirmed the judgment.

[*Referring to opinion of witness Dayton, the Court said*]: His opinion that Allan C. Varian's signature to the note in question, was his handwriting, could not have been very reliable; but it was admissible and its weight was for the jury to determine (*Greenl. Ev.*, § 577).

When a man pays a note to which his name is signed as maker, it is reasonable to presume his signature was in his handwriting [see *Cunningham v. Hudson River Bank*, 21 Wend., 559].

The Commission of Appeals reversed the judgment.

LOTT, Ch. C. [*on this ruling, said*]: The objection taken to the testimony was, that they had not shown themselves sufficiently acquainted with the defendant's handwriting to testify as to its genuineness. This was not tenable. They had some means, although slight, of enabling them to judge whether the signature was that of the defendant, yet sufficient, in their belief, to express an opinion in reference thereto. The extent of their knowledge, and the weight or effect to be given to their opinion, were proper matters for the consideration of the jury (see *Greenleaf on Evidence*, Vol. 1, § 577).

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Evidence was also given, against the defendant's exception tending to prove that he had recognized the validity and his liability for the payment of other notes to which his name, in conjunction with that of his co-defendant (who was his son), purported to be signed, but which he himself had not signed, after full knowledge that the signature was not in his proper handwriting. This, within the principle of the decisions in *Weed v. Carpenter* (4 Wendell, 219); *Same v. Same* (10 *id.*, 404), was admissible, in connection with the fact that his name was so signed by his co-defendant, or assumed so to have been, on the trial, for the purpose of showing that he had authorized it to be done, from which the jury might infer or presume an implied authority to sign his name to the note in question, if, as the judge at the circuit instructed the jury, he "was in the *habit* of recognizing these notes which his son thus signed in his name, as authorized and genuine notes" (see also *Cunningham v. Hudson River Bank*, 21 Wendell, 559).

[*Other evidence being erroneously admitted*].

Judgment reversed.

ROBINSON CONSOLIDATED MINING CO. v. CRAIG.

New York Supreme Court, 1886.

[Reported in 4 N. Y. State Rep., 478.]

The fact of having seen a person write is not essential to qualify a witness to prove his handwriting. Familiarity, acquired by receiving communications from him in the course of business, and acting upon them, is competent.

Plaintiff sued defendants, as sureties for one Thomas H. Greer, alleging breach of covenant by Greer in not accounting for royalties under a mining lease. The answer denied any indebtedness under the lease, or any agreement of suretyship.

Upon the trial, John C. Marrin, vice-president of the plaintiff company was called as a witness on behalf of the defendants and testified as follows, regarding transactions with one Carpenter, who was plaintiff's agent at the mine and received and transmitted royalties paid by Greer: "I do not know Carpenter per-

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sonally; Mr. Carpenter sent the moneys that were paid from time to time for the royalties arising from the ores that were taken out of this mine by Mr. Greer; I saw his signature to the communications, whatever they were, that accompanied the transmission of these moneys.

By Defendants' Counsel: Q. Will you look at this paper and say whether this signature is the signature of Thomas L. Carpenter?

Objected to by plaintiff's counsel.

A. I never saw Mr. Carpenter sign his name; I never saw him write at all.

To Defendants' Counsel: The signature to the paper shown me is his signature—to the best of my knowledge; I believe it is his.

To the Court: The knowledge that I have is derived from having received from Mr. Johnson the various communications from Mr. Carpenter to the company, which were usually handed me the date of the receipt, reading them over, and general knowledge of his handwriting.

Defendants' Counsel: I offer the paper referred to by the witness in evidence.

Objected to, and excluded. Defendant excepts.

At Circuit, judgment was entered for plaintiff.

The Supreme Court at General Term reversed the judgment.

DANIELS, J. [*on a motion by the respondent for a re-argument, said on this point*]: It (the evidence of Mr. Marrin) showed such a familiarity with the handwriting of the agent, whose name was attached to the receipt, as to prove his signature. The evidence as to this fact was given by the vice-president of the company, who had observed the signature of Carpenter, who was the agent of the company at the mine, upon communications which were signed by him to, and acted upon by, the company. This witness had not seen Carpenter write, but that was not necessary to enable him to prove his handwriting, if he had become familiar with it in another manner; and that he had become so, appears from his evidence. His statement was that he "saw his signature to the communications, whatever they were, that accompanied

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the transmission of those moneys," and the moneys he referred to were the royalties sent by Carpenter from time to time to the office of the company for the ores taken out of the mine by Mr. Greer, the lessee. The witness further testified that "the knowledge that I have is derived from having received from Mr. Johnson the various communications from Mr. Carpenter to the company, which were usually handed to me the date of the receipt, reading them over, and general knowledge of his handwriting." This Mr. Johnson mentioned by the witness was the president of the company, and the communications which were received related to its business and were connected with the transmission of moneys to it, and were acted upon as the genuine statements of Mr. Carpenter, the agent.

And that was sufficient within the rule applicable to proof of handwriting to enable the witness to acquire such familiarity with the signature of Carpenter as to enable him to identify and verify it. For that may be done by the witness acquiring a knowledge of the handwriting of another person by the inspection and examination of authentic documents of the description of those sent by Carpenter to the company. Upon this subject the rule is stated to be that the witness may testify to the handwriting of the person whose signature it is important to prove "from having seen letters, bills, or other documents, purporting to be the handwriting of the party, and having afterwards personally communicated with him respecting them, or acted upon them, as his, the party having known and acquiesced in such acts, founded upon their supposed genuineness; or by such adoption of them into the ordinary business transactions of life as induced a reasonable presumption of their being his own writings." Greenl. Ev. (7th ed.), § 577. And this witness was by his testimony shown to be within this latter statement of the rule. He was brought within what the court held to be the law in *Johnson v. Daverne* (19 Johns., 134).

Where the statement of it was approved, that, "the admissibility of the evidence must depend upon whether there is a good reason to believe that the specimens from which the witness has derived his knowledge were written by the supposed writer of the paper in question," and that has the sanction of the

Jackson v. Brooks, 8 Wend., 426.

case of *Rogers v. Ritter* (12 Wall., 317). From this knowledge and experience of the handwriting of Carpenter, the witness further testified, "the signature to the paper shown me is his signature, to the best of my knowledge. I believe it is his." And this, in the absence of any evidence tending to discredit the statement of the witness, sufficiently authenticated the receipt to entitle it to be read in evidence.

JACKSON v. BROOKS.

New York Supreme Court, 1832.

[Reported in 8 Wend., 426; affirmed in 15 Wend., 111, without opinion.]

Where the antiquity of a writing is such that no witness can swear that he has seen the parties write, a witness is competent to prove their signatures, who has become familiar with their signatures by inspecting other ancient writings bearing them, which have been treated and regularly preserved as authentic.*

Action of ejectment.

The plaintiff claimed under Arent Bradt, through *mesne* conveyances. To prove title in Bradt, two deeds dated in 1733 were produced by plaintiff, and one Vrooman testified that the grantors and witnesses had been dead too long a period for any person living to have seen them write; that he had acquired a knowledge of the handwriting of those grantors and witnesses by inspecting deeds in his possession from those persons which constituted some of his muniments of title, and could swear to the genuineness on the deeds in question. On this evidence, the deeds were admitted in evidence, over an objection to its sufficiency.

In the Circuit Court a verdict was entered for plaintiff, subject to the opinion of the court on a case made.

The Supreme Court entered judgment for defendant.

SAVAGE, Ch. J. [*after stating the facts*]: Evidence of this description has been distinguished from comparison of hands.

*To the same effect, *Rogers v. Ritter*, 12 Wall., 317.

 Note on Proof by Non-expert.

The witness is supposed to have formed a standard in his mind, from an examination of writings deemed authentic and with that standard to compare the writings in question (1 Phil. Ev., 428, Gould's ed., 1823). It is added: "When the antiquity of a writing purporting to bear a person's signature, makes it impossible for a witness to swear that he has ever seen the party write, it has been held sufficient that the witness should have become acquainted with his manner of signing his name, by inspecting other ancient writings which bear the same signature, provided those ancient writings have been treated and regularly preserved as authentic documents (7 East., 282 n. and 14 *id.*, 328). The documents in this case, from an examination of which the witness formed his opinion, have been preserved as muniments of title, and constitute the evidence of the title of the defendant himself to a small piece of land included in the same deed with the premises in dispute. The deeds, therefore, from Jan Wemp and Arent Bradt to Jacob Glen, and from the latter to Arent Bradt, must be considered as sufficiently proved, and they show title in Arent Bradt.

NOTES OF RECENT CASES ON TESTIMONY OF NON-EXPERT WITNESS.

Alabama : Cambell *v.* Woodstock Iron Co., 83 Ala., 351; s. c. 3 Southern Rep., 369 (a witness who has corresponded with a person is competent to testify as to his handwriting though the witness has never seen his correspondent). Gibson *v.* Trowbridge Furniture Co., 1893, 11 Southern Rep., 365 (one cannot be permitted to testify as to the genuineness of handwriting of another, who has merely seen writings purporting to be those of such other person, but who has not been shown to have personally communicated with him respecting them, or to have acted upon them as his). Nelms *v.* State, 1891, 9 Southern Rep., 193 (a non-expert, who has seen defendant write but once and has seen but one writing that he knew to be defendant's, and who states that he is not familiar with defendant's handwriting, is not a competent witness in relation thereto). *Colorado*: Salazar *v.* Taylor, 1893, 33 Pacific Rep., 369 (a bank-teller who has seen the checks of a person may testify as to his handwriting). *Georgia*: Wimbish *v.* State, 89 Ga., 294; s. c. 15 Southeast Rep., 325 (a non-expert cannot testify as to the identity of handwritings if his opinion is wholly founded upon the comparison of a signature, which he knows to be genuine, with the one

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which is in question ; it makes no difference that he saw the genuine signature executed unless he testifies that by some means or other he knows or would recognize the handwriting of the person who executed it). *Illinois*: *Ennor v. Hodson*, 28 Ill. App., 445, (one who testifies that he is acquainted with a person's signature from seeing it attached to papers known to have been signed by him, is a competent witness as to the handwriting of such person). *First National Bank of Galesburg v. Hovall*, 24 *id.*, 594 (a witness who had only examined the signatures of defendant, admitted to be genuine after the dispute arose, held not a competent witness as to defendant's handwriting). *Riggs v. Powell*, 1892, 32 Northeast. Rep., 482 (in order to render a witness competent to testify as to handwriting it is not necessary that he should directly state that he is familiar with the persons handwriting, if the fact otherwise sufficiently appears from his testimony). *Indiana*: *Talbott v. Hedge*, Ind. App., 1893, 32 Northeast. Rep., 788 (a witness is not competent to testify as to another's handwriting who has merely received a notice purporting to be signed by the person whose signature is in dispute, and who has never seen such person write, and it does not appear that the signature was ever acknowledged by the person purporting to have signed it, or that the notice was ever acted upon by the witness). *Iowa*: *Egan v. Murray*, 80 Iowa, 180; s. c. 45 Northwest. Rep., 563 (a witness who answered affirmatively a question as to whether he was acquainted with the handwriting of the person whose signature was in dispute, and who was not cross-examined as to such knowledge, may give his opinion as to the genuineness of the disputed signature). *Kansas*: *Arthur v. Arthur*, 38 Kan., 691; s. c. 17 Pacific Rep., 187 (a witness cannot testify as to the signature of another unless his knowledge of the other's handwriting is first shown). *Louisiana*: *Succession of Morvant*, 45 La. Ann.; s. c. 12 Southern Rep., 349 (any person who has seen another write and has acquired a standard in his mind of such person's writing is a competent witness as to the genuineness of a writing purporting to have been made by such person). *Minnesota*: *Berg v. Peterson*, 49 Minn., 420; s. c. 52 Northwest. Rep., 37 (a witness may acquire sufficient knowledge of another's handwriting to enable him to testify in relation thereto from having seen papers purporting to have been executed by the person whose writing is in dispute and which he has acknowledged or acquiesced in as being genuine). *North Dakota*: *Territory v. O'Hare*, 1 N. Da., 30; 44 Northwest. Rep., 1003 (an expert in handwriting who has seen defendant write but once, and then, only to enable the expert to become a witness, is incompetent). *North Carolina*: *Tuttle v. Rainey*, 98 N. C., 513; s. c. 4 Southeast. Rep., 475 (it is not necessary that a witness as to handwriting should have seen the person write; it is sufficient if he has acquired knowledge of such person's handwriting from handling papers admitted to be genuine). *Pennsylvania*: *Second Natl. Bk. v. Wentzel*, 151 Pa. St., 142; s. c. 24 Atlantic Rep., 1087 (a witness who testifies that he saw defendant's signature, which defendant admitted to be genuine may be permitted to give his opinion as to the genuineness of defendant's signature to the note in suit). *Wilson v. Van Leer*, 127 Pa. St., 371; s. c. 17 Atlantic Rep., 1097

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(it is within the discretion of the trial court to allow a witness to testify as to another's handwriting, although the witness testifies that he has only seen the person whose signature is in dispute write twice in 32 years and once endorse a check, 23 years before). *South Carolina*: *Weaver v. Whildon*, 33 S. C., 190; s. c. 11 Southeast. Rep., 686 (it is not error to refuse to permit a non-expert, unfamiliar with the handwriting of an alleged grantor to testify as to the genuineness of his signature by comparison with other signatures admitted to be genuine). *Stoddard v. Hill*, 1893, 17 Southeast. Rep., 138 (it is sufficient if a witness as to handwriting states that he knows the handwriting of the person which is sought to be proved, though he is not directly asked whether he has seen such person write). *Utah*: *Tucker v. Kellogg*, 1892, 28 Pacific Rep., 870 (a witness who as administrator has seen numerous checks and notes among the papers of intestate, and who states that he is acquainted with deceased's signature, is a competent witness to testify as to deceased's handwriting).

Comparison with writing not produced.

Spottiswood v. Weir, 80 Cal., 448; s. c. 23 Pacific Rep., 289 (a non-expert cannot testify that the signature to a lost deed which he has seen was the same as the signature to another deed produced and shown to him).

Hammond v. Wolf, 78 Iowa, 227; s. c. 42 Northwest. Rep., 778 (a witness may give his opinion as to the genuineness of a disputed lost signature which he has seen, based upon a comparison of his recollection of it with a signature of the same person in evidence and admitted to be genuine).

Mugge v. Adams, 76 Tex., 448; s. c. 13 Southwest. Rep., 330 (a witness who has not qualified himself to testify as to the handwriting of a person who signed a letter not produced cannot be permitted to express an opinion that the unproduced signature was similar to the signature of an instrument in the cause).

The New York statutes which provide for proof of handwriting by standards of comparison, are as follows:

L. 1880, C. 36: "§ 1. Comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine, shall be permitted to be made by witnesses in all trials and proceedings, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute.

"§ 2 [as amended by L. 1888, C. 555]. Comparison of a disputed writing with any writing proved to the satisfaction of the court to be the genuine handwriting of any person, claimed on the trial to have made or executed the disputed instrument or writing, shall be permitted and submitted to the court and jury in like manner. But nothing within contained shall affect or apply to any action or proceeding heretofore commenced or now pending."

PECK *v.* CALLAGHAN.

New York Court of Appeals, 1884.

[Reported in 95 N. Y., 73.]

To prove the genuineness of standards of comparison under N. Y. L., 1880, c. 36 [and consequently under N. Y. L., 1888, c. 555], it is not necessary to produce a witness who saw them written; but opinion evidence is competent, and may be sufficient. The act leaves the sufficiency of the identification of the standards, and, *it seems*, their number and character, to the discretion of the trial judge.*

Application for probate of the will of Gertrude B. Callaghan, contested on the grounds (among others) that the signature was forged.

On the trial, William M. Murray, cashier of the Goshen National Bank, was called by proponent, and testified on direct examination that he had seen decedent endorse her name on the back of certificates of deposit, that he was acquainted with her

*So far as this case also holds that the contestant cannot offer in evidence specimens of the handwriting of the person who is claimed to have forged the instrument, it is superseded by L. 1888, c. 555.

Peck v. Callaghan, 95 N. Y., 73.

writing, and able to recognize it, and identified her signature on a number of certificates. Thereupon proponent's counsel offered the certificates in evidence for the purpose of enabling experts to give their opinions as to the genuineness of her signature to the will by comparison with such specimens.

Contestant's counsel objected to the certificates as incompetent and immaterial, on the ground that in the states where this class of testimony has heretofore been allowed, the handwriting of the party proposed as a standard test cannot be proved by the opinion of the witness, but that before the writings are proper to be introduced as standard, the actual evidence of a person who saw the papers written must be had, and that the evidence of a witness who is acquainted with the handwriting is not sufficient. Counsel made the further general objection, that the evidence is incompetent and irrelevant, on the ground that this new statute has not changed the rule of the evidence upon this subject.

The Surrogate: "I think this statute justifies receiving the usual proof of the signatures, and that upon that proof being uncontradicted, the court is to be satisfied that that is the genuine signature of the person it purports to be, and that the court is not to stop to try the issue, and that upon that basis the court is justified in receiving the evidence by way of comparison respecting that signature; I will therefore overrule the objection."

Subsequently, the contestant's counsel offered in evidence specimens of the handwriting of a person who was claimed by contestant to have forged the will. The surrogate refused to receive such specimens in evidence.

The Surrogate admitted the will to probate.

The Supreme Court at General Term affirmed the decree without opinion.

The Court of Appeals affirmed the judgment.

RUGER, Ch. J. [*after stating the facts*]: The appellant, on the hearing, objected to the introduction of specimens of the handwriting of the decedent, offered for the purpose of enabling experts to give their opinions as to the genuineness of the signa-

ture to the will by comparison with such specimens, and excepted to the decision of the surrogate admitting such evidence.

We think the evidence was proper under chapter 36 of the laws of 1880. This act was evidently intended to enlarge the rules of evidence and extend the facilities for testing the handwriting of a party, the genuineness of whose signature was disputed, beyond the opportunities afforded by the then existing rules.

It was theretofore competent to give the evidence of experts as to the genuineness of handwriting by comparison with other specimens of the party's handwriting, which had been admitted in evidence for other lawful purposes on the trial; but it had not been competent to introduce such specimens for the sole purpose of comparison. (*Miles v. Loomis*, 75 N. Y., 288; 31 Am. Rep., 470.) The evils apprehended from the introduction of such evidence have been stated to be, *first*: the selection of unfair specimens of the handwriting which is in dispute by the party offering them in proof, and *second*: the embarrassments arising from the multiplication of issues over the genuineness of the various signatures which might be offered in evidence. (*Miles v. Loomis*, *supra*.) The act in question leaves the character, number and sufficiency of identification of the specimens offered in evidence for the purposes of comparison entirely to the discretion of the court, and thus attempts to obviate the objections formerly existing to this species of evidence.

The language of the act, however, which permits the introduction of specimens of a person's handwriting for the purpose of comparison, when proved to the satisfaction of the court, authorizes only the admission of such writings as purport to be the handwriting of the person, the genuineness of whose signature is disputed. The disputed writing referred to in the statute relates only to the instrument which is the subject of controversy in the action, and the specimens of handwriting admissible thereunder are those of the person purporting to have executed the instrument in controversy. Any other construction would place it within the power of a contestant to introduce in evidence specimens of the handwriting of as many persons as he should see fit to charge with the act of forging the signature in dispute.

Hall v. Van Vranken, 28 Hun, 403.

The exception, therefore, by the appellant to the decision of the surrogate, excluding specimens of the handwriting of a person who was claimed to have forged the signature to the will in question was not well taken.

HALL v. VAN VRANKEN.

New York Supreme Court, 1882.

[Reported in 28 Hun, 403.]

The genuineness of an irrelevant paper offered as a standard of comparison, under L. 1880, c. 36,—permitting the comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine—is a preliminary question for the court, not a question for the jury.

The signature of a deed, the execution of which was acknowledged before a notary and duly certified, may be received as a standard for comparison, without further evidence than the certificate of acknowledgment, although there be no proof of the identity of the party with the signer of the deed, except the identity of name and the fact that he does not offer to disprove the assertion.

In this action the signature of a note was in issue.

The Supreme Court affirmed judgment for plaintiff.

LEARNED, P. J., said : The statute of 1880, chapter 36, permits the comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine. This proof of genuineness, therefore, is addressed to the court, in distinction from the jury. The evidence on this point is not direct evidence upon the merits. It is somewhat analogous to evidence tending to prove the competency of one who is called as an expert and the like. And the general rule, in regard to such classes of evidence is, that as the evidence is addressed to the court, error cannot be alleged in respect thereto. The degree of proof which shall show that a witness has experience enough to testify as an expert must be left to the trial judge. So, too, the sufficiency of the proof which shall show that a paper is genuine, so that it may be used for comparison, must be also left to the trial judge.

Possibly, to admit a paper without any evidence of its genuineness might be error.

Now, in this case, a deed executed and acknowledged by the defendant was admitted for the purpose of comparison with the disputed note. And the defendant objects to this.

Of course, a person, whose name had been signed to a deed, might acknowledge the instrument—and thus adopt a signature made by some other person. And therefore an acknowledgment of a deed is not conclusive evidence that the signature is that of the party. But it is certainly *prima facie* evidence of that fact. In the very great majority of cases signatures to deeds are made by the parties thereto. The cases are rare where a party adopts a signature made by another person.

If a person on borrowing money were to deliver a note purporting to have been signed by him, would not that be *prima facie* evidence that the signature was in fact his own? True he might have caused some one else to sign for him, and by adopting the signature might bind himself. But in the majority of cases such signature would be genuine, and it is therefore *prima facie* to be so considered.

Witnesses have often testified to a knowledge of handwriting based on correspondence with the party. Now, in such cases, the correspondence might possibly have been written by some other person, with the authority of the party whose name was used. Yet, inasmuch as persons usually write their own letters (unless the letters otherwise indicate), a knowledge of handwriting gained by correspondence makes a witness competent, although the witness never saw the party write.

Now, in the present case, a deed acknowledged by the defendant was offered for the purpose of comparing the signature. The defendant was present at the trial; he made no offer to disprove the genuineness of the signature to the deed, a matter which he could easily have done, if it had not been genuine, and it was thereupon admitted for comparison only.

The defendant urges that this was improper, because he says that a certified copy from the record would, on this principle, be equally proper as a standard of comparison (Code C. P., 935). But there is no weight in that argument. A certified copy does

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not purport to contain the signature of the party, but on the contrary purports to contain a copy thereof. The original deed purports to contain the genuine signature. We think that there was not an absence of all evidence as to the genuineness of the signature to the deed, and therefore there was no error in this respect.

It is again urged that there was no proof of identity between the signer of the deed and the defendant. Identity of name, coupled with the fact that the defendant made no offer to disprove the assertion that he was the signer of the deed, was enough to authorize the court to hold the signature of the deed to be the defendant's.

The plaintiff was asked whether that was the signature of the defendant attached to the note, and this was excluded. It did not appear that the plaintiff had any knowledge as to the making of the note, or as to the defendant's handwriting. It does not seem therefore that he could have given any evidence in aid of the defendant's case on this point. He afterwards stated that from the evidence before him the signature was defendant's. That testimony was objected to after it had been given. But there was no ruling. It proved nothing and was of no consequence.

On behalf of the defendant, one Phair had testified that the signature to the note was not the defendant's. In order to discredit this testimony he was asked on cross-examination as to certain statements which he had made to the plaintiff respecting this note. And afterwards the plaintiff was allowed to contradict Phair's testimony on this point. The testimony of Phair on his cross-examination was not so collateral that the plaintiff might not contradict it. The admission of the defendant as to the existence of the note was coupled with the assertion that it had been paid. The fact that the note was still in possession of the plaintiff tended to contradict the defendant's assertion that it had been paid.

The important question in this case is that which is first discussed in the opinion. The others are of little consequence. And we may add, that under the Iowa statute referred to, the instrument used for comparison is to be "proved to be genuine"—not proved to the satisfaction of the court. Thus it would seem that

the question of genuineness in that state is one for the jury. We cannot, for that reason, give much weight to *Hyde v. Woolfolk*, (1 Iowa, 159).

An examination of the opinion in that case convinces us that it cannot be taken as a well-considered expression of the law. Doubt is therein expressed, whether a writing used for comparison can be proved by the testimony of witnesses, who have only seen the party write, if they have not seen him write that identical paper. And the court, in that case, does not appreciate the reason of the old rule (abolished by the statute under consideration) which forbade the introduction of writings, merely for the purpose of comparison.

The statute allowing comparison of writings is most beneficial. Anyone who has had experience in the trial of questions of disputed handwriting, must have seen the worthlessness of expert testimony. Nothing can be so useful on this class of questions, which are generally perplexing, as to permit an examination with other writings proved to be genuine to the satisfaction of the court. And on this collateral matter we may safely repose a liberal discretion in the trial judge, who sees much from the conduct of the parties that does not appear on appeal papers.

Judgment affirmed, with costs.

NOTE.—In *Mortimer v. Chambers*, 63 Hun, 335, an action was brought under §§ 1843–1850 of the Code of Civil Procedure, against defendants, as devisees under the will of one Louisa F. Fardon, for the purpose of charging upon real estate devised to them certain alleged debts of the testatrix, evidenced by her promissory notes.

Upon the trial the plaintiff sought to compare the signature of the testatrix upon the notes with a signature which appeared upon a bond. This bond with the mortgage collateral to it was produced and the bond put in evidence, and the genuineness of the signature proven by the subscribing witness. *Held*, that such practice was proper. *ANDREWS, J.* [*on this point*]: The bond only appears to have been put in evidence. The witness who produced these papers testified that he was an attorney in this state, and, as the attorney of Mrs. S. E. Morgan, he held a bond and mortgage given by Louisa F. Fardon to the Home Insurance Company, which were the ones produced by him in court; that he had the papers first about two years ago, and that they were still outstanding liens on the real property, described in the complaint in this action, and that the witness had gone to the insurance company with an assignment of the same. Mr. Coman, also called for the plaintiff, testified that he was an

attorney and was the subscribing witness to the bond, and that the name of the subscribing witness there was his own name and in his handwriting; that he saw that paper executed by Mrs. Louisa F. Fardon. He also testified as follows: "I saw her sign it. I know her. I searched the title and had to do with the getting of this bond and mortgage from Mrs. Fardon to the Home Insurance Company. I had charge of it. * * * I connect Mrs. Fardon with some Rockland County transaction, in addition to this, but I cannot be more specific. * * * I have no doubt that Louisa F. Fardon, who is the mortgagor in this instance, signed that in my presence." It also appeared by the testimony that the plaintiff was the sister, and that the defendant Mary Ann Chambers was the daughter of the testatrix; also, that the plaintiff had at one time lived with the testatrix, and at another time with said daughter; and that the testatrix, with her husband, had at one time lived upon the premises described in the complaint. We think that the evidence was sufficient to prove that Louisa F. Fardon, the testatrix, was the same Louisa F. Fardon who signed the bond, and that the signature to the bond was the signature of the testatrix; and this established a sufficient basis for a comparison of the signature upon the bond with the signature upon the notes. Mr. Ames, an expert in handwriting, was called as a witness for the plaintiff, and testified, in substance, that the signature of Louisa F. Fardon upon the notes was written by the same person who wrote the signature Louisa F. Fardon upon the bond. No contradictory evidence was offered by defendant's counsel, although the defendant, Mary Ann Chambers, was called as a witness, and, as she appears by her evidence to have been an intelligent person, it may be fairly presumed that she was familiar with her own mother's signature; and it is, therefore, somewhat significant that no attempt was made to prove by her that the signatures upon the notes were not the genuine signatures of her mother. Moreover, another significant fact is that when the plaintiff, the sister of the testatrix, was on the stand, she was asked this question: "In whose handwriting is the signature and in whose handwriting is the body of each of these three promissory notes which have been shown you?" This question was objected to by the defendant's counsel, and the objection was sustained. We think that the making of the notes was sustained by the evidence.

It is also insisted by the counsel for the defendants that there was no evidence that the notes in question, or any of them, were or was ever delivered to the plaintiff, or that the testatrix ever negotiated or knowingly parted with the said notes.

The plaintiff, against the objection of defendant's counsel, testified upon the trial that the notes in suit had been in her possession prior to the month of December, 1880, when Mrs. Fardon died, and were in her possession at the time of such death.

It is claimed that this was testimony in relation to a personal transaction with the deceased, and that under Section 829 of the Code it was not competent. We do not think this objection is well taken. In *Simmons v. Havens* (101 N. Y., 433) it was said: "Exception was also taken to the

Mutual Life Ins. Co. of N. Y. v. Suiter, 131 N. Y., 557.

plaintiff being allowed to testify that she had the deed in her possession, and that the 'signature was in the handwriting of her mother; she was not asked, and did not state, from whom she received the deed; and her testimony as to the handwriting or the contents of the deed did not involve a personal transaction between her and her mother.' The plaintiff might have received the deed from some third person." Counsel for the defendants, in his brief, points out some particulars wherein the case of *Simmons v. Havens* differs from the case at bar. But the portion of the opinion above quoted is clear and explicit, and whatever differences between the cases may exist, we think that the decision in that case applies to and controls the case at bar (see also *Taber v. Willetts*, 44 Hun, 346; *Greer v. Greer*, 20 N. Y. Civ. Pro. Rep., 75; *Wing v. Bliss*, 8 N. Y. Supp., 500).

MUTUAL LIFE INSURANCE COMPANY v. SUITER.

New York Court of Appeals, 1892.

[Reported in 131 N. Y., 557.]

A party who claims that the signature in question in the action is not hers, has a right under the acts of 1880 c. 36, and 1888, c. 555 to give in evidence specimens sworn by her to be her own signature and made before the controversy arose, in order to use them as standards of comparison.

In an action to foreclose a mortgage, plaintiff relied on an assumption clause in a conveyance to the defendants which purported to be executed and acknowledged by the defendants as parties of the second part.

Upon the trial it was claimed by defendants that the alleged signatures of the grantees to the deed as well as that of the notary public to the acknowledgment were forgeries.

Plaintiff claimed that the defendant Mary A. Suiter had written her own signature and the signature of her mother and sister, (the other grantees) to the deed, and that then each of the latter had made her mark.

The defendant Mary A. Suiter was called as a witness in her own behalf and was asked the following question by her counsel as to her signature written on a scrap of paper, marked, "Exhibit D":

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“Q. Did you write these words Mary A. Suiter, Manlius, N. Y., on there? A. Yes, sir.

Q. Is that your handwriting? A. Yes, sir.

Q. You may state to the court when you wrote it? A. About two years ago.

Defendant's Counsel: I offer it in evidence. Of course we had to gather this up the best way we could.

Plaintiff's Counsel: I object to it as incompetent, immaterial and improper. It is in pencil.

The Court: I don't think the signature of a party written on a loose scrap of paper at some time or another should be put in evidence. I will sustain the objection. It would be a most dangerous rule to adopt. I will sustain the objection on that particular piece of paper. Defendant excepted.

Further examined by her counsel:

Q. I show you exhibit E. Is that in your handwriting? A. Yes, sir.

Q. How long ago did you write that? A. That is about fourteen years ago.

Q. Is exhibit F. in your handwriting? A. Yes, sir.

Q. What was the occasion of you writing that? A. It was a song and I wrote my name on it.

Q. How long ago? A. About twelve or thirteen years ago.

Q. Is the body of it in your writing? A. Yes, sir. It is all in my writing.

Q. This exhibit E., how came you to write that? A. That is the song.

Q. Where has it been ever since? A. I have had it lying on the melodion.

Q. At home? A. Yes, sir; just came across it the other day.

Defendants Counsel: I think those specimens, Exhibits E. and F., should be put in evidence.

Plaintiff's Counsel: When was that written: did she say?

Defendant's Counsel: Q. When was the last one written? A. About twelve or thirteen years ago.

Plaintiff's Counsel: I object to that as incompetent, immaterial and improper.

By Defendants Counsel: Q. Are these the only specimens of your handwriting at home you could find to bring here? A. I have got some more in books, I didn't care about bringing in court; I didn't think they would be of any use.

Defendant's Counsel offered Exhibits E. and F. in evidence for the purpose of comparison only.

Objected to as incompetent, immaterial and improper. Evidence excluded. Exception taken."

The Supreme Court at Special Term directed judgment for plaintiff.

The Supreme Court at General Term reversed the judgment.

The Court of Appeals affirmed the judgment of the General Term.

EARL, J., [*after stating facts*]: It will be observed that these three signatures were not excluded upon the ground that they were not sufficiently proved, or that the judge was not satisfied that they were genuine. We agree with the General Term that these signatures should have been received in evidence for comparison.

They would have given to the expert witnesses a wider range for comparison. As it was, the only signatures they had for comparison with the alleged forged signatures were the signatures of Mary A. Suiter to her affidavit upon the answer and the signature of Ann Suiter to her affidavit upon her answer in this action, which was written by Mary A. Suiter. So that there was in evidence for comparison only one signature of the name of Mary A. Suiter, with which the experts could compare the alleged forged signature. We think the range of comparison was altogether too narrowly limited, and that it could not be thus arbitrarily confined. It cannot be said that the exclusion of this evidence was harmless. It was rendered competent by the act, chapter 36 of the Laws of 1880, as amended by the act, chapter 555 of the Laws of 1888, and whatever the views of the trial judge may have been as to its value or safety, he should have received it.

For this rejection of this evidence the judgment was properly

Notes on Proof by Comparison.

reversed at the General Term, and its order should be affirmed and judgment absolute rendered against the plaintiff, with costs.

All concur (FINCH, J., in result), except, PECKHAM, J., not sitting.

NOTES OF RECENT CASES ON PROOF BY STANDARDS OF COMPARISON.

Alabama: Snider v. Burks, 84 Ala., 53; s. c. 4 Southern Rep., 225 (upon a contested probate of a will the court properly refused to allow contestant to exhibit to a witness as to the handwriting of a deceased witness to the will, for the purpose of comparison with the latter's signature to the will, other papers not in evidence purporting to have been written by the deceased witness); s. p. Gibson v. Trowbridge Furniture Co., 1893, 11 *id.*, 365. *California*: Marshall v. Hancock, 80 Cal., 82; s. c. 22 Pacific Rep., 61 (where the genuineness of the signature of one who is justice of the peace is in dispute, and the genuineness of his signature to his official docket as justice has been proved to the satisfaction of the trial judge, the docket is admissible in evidence for the purpose of comparison with the disputed signature without formal proof that it is a public record). *Illinois*: Rogers v. Tyley, 1892, 32 Northeast. Rep., 393 (the genuineness of the handwriting of a letter may be established by comparison with other instruments written by the same person by whom the letter purports to have been written which are already in evidence for other purposes); s. p. Frank v. Taubman, 31 Ill. App., 592; Himrod v. Bolton, 44 *id.*, 516. Travers v. Snyder, 38 *id.*, 379 (it is error to allow the jury upon defendant's request to compare defendant's disputed signature to the note in suit with his signature to the plea; it being obnoxious to the principle, that a party should not be allowed to manufacture evidence for himself). Gitchell v. Ryan, 24 *id.*, 373 (the genuineness of a signature cannot be proved or disproved by a witness comparing the disputed signature with others admitted to be genuine). Bevan v. Atlanta Nat. Bk., 1892, 31 Northeast. Rep., 679 (where a witness has testified from his knowledge as to the genuineness of a disputed signature, it is proper on cross-examination to show the witness another signature admittedly genuine and to ask him whether he based his opinion on such signature, and whether its spelling was not different from the disputed signature; but the signature shown the witness is not admissible in evidence for the purpose of allowing a comparison of the handwriting). *Indiana*: Swales v. Grubbs, 126 Ind., 106; s. c. 25 Northeast. Rep., 877 (a witness for the adverse party may compare the disputed signature with other signatures to instruments signed by the party disputing his signature and introduced in evidence by him for other purposes). White S. M. Co. v. Gordon, 1890, 24 Northeast. Rep., 1053 (a signature to an instrument not in evidence and not admitted to be genuine cannot be given in evidence for the purpose of allowing

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them to be compared with the disputed signature); s. p. *Walker v. Steele*, 121 Ind., 436; s. c. 22 Northeast. Rep., 142; *Merritt v. Straw*, Ind. App., 1893, 33 *id.*, 657. *Iowa*: *Sankey v. Cook*, 82 Iowa, 125; s. c. 47 Northwest. Rep., 1077 (the standard of comparison must be so absolutely established that the jury may be instructed as a matter of law that it is genuine). *Kansas*: *State v. Zimmerman*, 47 Kan., 242; s. c. 27 Pacific Rep., 999 (upon a trial for forgery where both the evidence for the State and defendant show that an instrument has been genuinely executed by the person whose signature is alleged to have been forged, it is error not to permit the defendant to introduce such instrument in evidence for the purpose of comparison with the disputed signature); s. p. *Holmberg v. Johnson*, 45 Kan., 197; s. c. 25 Pacific Rep., 575. *Maine*: *State v. Thompson*, 80 Me., 194; s. c. 13 Atlantic Rep., 892 (it is for the court and not for the jury to determine whether the genuineness of the standard of comparison has been sufficiently proved; and upon appeal an objection to its admission will not be sustained unless there has been some erroneous application of the law to the facts or it has been admitted without any competent evidence as to its genuineness). *Michigan*: *Dietz v. Fourth National Bk.*, 69 Mich., 287; s. c. 37 Northwest. Rep., 220 (where a party as a witness denies that a signature is his and on cross-examination admits that signatures to other instruments foreign to the cause are genuine, it is error not to admit such instruments in evidence for the purpose of allowing the jury to compare their signatures with the disputed signature). *Missouri*: *Edmonston v. Henry*, 45 Mo. App., 346 (a signature to a document not a part of the case cannot be proved with a view of using it as a standard of comparison of a party's handwriting). *Nebraska*: *Grand Island Bkg. Co. v. Shoemaker*, 1892, 47 Northwest. Rep., 696 (orders on a school fund drawn by defendant, who was treasurer of a school district, and shown to be genuine, are admissible in evidence to enable the jury to make comparison with the signature of a note purporting to have been made by defendant). *New York*: *McKay v. Lasher*, 121 N. Y., 477; s. c. 24 Northeast. Rep., 711 (documents used for comparison of handwriting may be proved according to the general rules of evidence applicable to the proof of handwriting and need not be established by the testimony of a witness who saw the party write them). *Mortimer v. Chambers*, 63 Hun, 335; s. c. 17 N. Y. Supp., 874; 43 State Rep., 365 (a standard of comparison may be sufficiently established by a witness who has seen the person, whose signature is disputed, write). *People v. Pinckney*, 67 Hun, 428; s. c. 22 N. Y. Sup., 118 (a jury can only compare writings in aid of witness' testimony; and it is error to submit them to the jury unless the witness has first examined them). *Mutual Life Ins. Co. v. Suitor*, 131 N. Y., 557; s. c. 29 Northeast. Rep., 822 (it is error not to permit the party, who denies that he executed the instrument in suit to introduce in evidence for the purpose of comparison other writings satisfactorily proven to be executed by him). *Bruyn v. Russell*, 52 Hun, 17; s. c. 4 N. Y. Supp., 784; 22 State Rep., 374 (comparison of handwriting is confined to the disputed signature and the genuine handwriting of the person

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by whom such signature purports to have been written; a comparison cannot be made between the disputed signature and the admitted genuine handwriting of the person who is charged with the forgery). *North Carolina*: Tunstall v. Cobb, 109 N. C., 316; s. c. 14 Southeast. Rep., 28 (it is error to allow an expert to compare the disputed signature with the handwriting of a paper not in evidence or admitted to be genuine, and which depends on proof for its authenticity). Croom v. Sugg, 110 N. C., 259; s. c. 14 Southeast Rep., 748 (in an action against executors who deny that a bond was executed by their testatrix, defendants are estopped to deny the genuineness of testatrix's signature to the will, and an expert may be allowed to compare the signature thereto with the signature to the bond). Fuller v. Fox, 101 N. C., 119; s. c. 7 Southeast. Rep., 589 (though an expert may compare a signature admitted to be genuine with the signature in dispute, it is not error not to allow the signature used as the standard of comparison to be submitted to the jury; the jury are not experts and cannot make a comparison of handwriting); s. p. Forbes v. Wiggins, 112 N. C., 122; s. c. 16 Southeast. Rep., 905. *Oregon*: Holmes v. Goldsmith, 147 U. S., 150; s. c. 13 Supm. Ct., 288 (under 1 Hills Oreg. Ann. L., § 765, the introduction of papers otherwise incompetent in evidence for the purpose of enabling the jury to make a comparison of handwriting is proper). *South Carolina*: United States v. McMillan, U. S. Dist. Ct., E. D., S. C., 1886, 29 Fed. Rep., 247 (in South Carolina papers can only be offered in evidence as a standard of comparison when no collateral issue can be raised concerning them). *Tennessee*: Powers v. McKenzie, 90 Tenn., 167; s. c. 16 Southwest. Rep., 559 (the genuineness of a deed being the matter in controversy other writings of the parties or witnesses thereto, which are deemed genuine by the court may be admitted in evidence under the Act of 1889, c. 22, though otherwise irrelevant, for the purpose of allowing them to be compared with the disputed instrument by an expert witness, and to be considered with the opinions of such witness as evidence in the cause); s. p. Franklin v. Franklin, 90 Tenn., 44; s. c. 16 Southwest. Rep., 557. *Vermont*: Rowell v. Fuller, 59 Vt., 688; s. c. 10 Atlantic Rep., 853 (when a signature is in dispute and other signatures are offered in proof as standards of comparison, it is error for the court, without determining itself whether the signatures to be used for comparison are genuine, to admit them in evidence and let them go to the jury with a statement that if the jury should be satisfied upon full examination of all the proof that such signatures were not genuine, the comparison would go for nothing).

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MILES v. LOOMIS.

New York Court of Appeals, 1878.

[Reported in 75 N. Y., 288.]

A witness, who is qualified as an expert, may, at the trial, compare the disputed signature with other signatures, the genuineness of which has been established, and is competent to give his opinion as to the genuineness of the signature in dispute.

Such witness may also state whether, in his opinion, the disputed signature is simulated.

Defendants were sued, as executors of James M. Miles, upon a promissory note, purporting to have been made by deceased. Defendants claimed that the note was forged.

Upon the trial, plaintiff put in evidence the disputed note, which was marked "Ex. No. 2." The defendants put in evidence, without objection, a note, the body of which, including the name of James M. Miles, was proved to be in the handwriting of the deceased, and the same was marked "Exhibit A." They also put in evidence, without objection, the deceased's will, which had been duly probated; this was marked "Exhibit B." John W. Truesdell was called by defendants and, after qualifying as an expert, was asked: "Won't you look at the body of this note, 'Ex. A,' and particularly at the name of James M. Miles, which appears in the body, and also at the signature of James M. Miles to that will; now look at the signature of Ex. No. 2. Assuming that the name of James M. Miles in the body of Ex. 'B' and the signature of James M. Miles to the will which you have before you are genuine signatures, what is your opinion as to the genuineness of the signature attached to Ex. No. 2?"

Objected to as incompetent; that such comparison of hands cannot be made by experts. Objection overruled and exception taken.

A. I should say that this handwriting (Ex. No. 2) does not agree with this one (Exs. 'A' and 'B'). I should not think that the same person wrote it: I should say these two (Exs. A and B) were written by the same person. This (Ex. No. 2) I don't think could be.

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Q. Now, I would ask you whether, in your opinion, the signature to Ex. No. 2 is a simulated signature?

Objected to as incompetent; objection overruled and exception taken.

A. Yes, sir; I think there is an effort to imitate this hand in the other two instruments."

Defendants recovered.

The Supreme Court at General Term affirmed the judgment.

TALCOTT, J. [*after reviewing numerous authorities said*]: We think that the weight of authority and the tendency of modern decisions is to establish the rule, that experts may be examined to give their opinions from a comparison of a disputed signature with other genuine writings in evidence in the cause, and to state from an examination of the genuine writings and the disputed signature whether the latter appears to be simulated; of course all these signatures are open to the examination of the referee or jury, and they are not concluded by the opinions of the experts, but may hear those opinions on the subject, giving them such weight as in view of all the circumstances they may deem them entitled to.

The Court of Appeals affirmed the judgment.

HAND, J. [*after holding that, since no objection had been taken at the trial, appellant could not on appeal question the admissibility of the documents containing the genuine signatures*]: Treating, therefore, these two signatures of the testator as properly in evidence, the question is, whether experts in handwriting could be permitted, upon comparison in court of these signatures with that of the note in suit, without any other knowledge of the testator's writing, to express an opinion as to the genuineness of the latter, and as to whether it appeared a natural or simulated hand.

The statement of the learned counsel for the appellant, that precisely this kind of evidence has never yet been held proper by the court of last resort in this state is, we believe, accurate, although it comes in *principle* within the decision in *Dubois v. Baker* (30 N. Y., 355, 361). Indeed, I think it must be conceded

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that the earlier cases adjudged in our courts lean pretty decidedly against the admissibility of such evidence. In this respect we were formerly more strict than any of the other states. (*People v. Spooner*, 1 Den., 343; *Jackson ex dem. v. Phillips*, 9 Cow., 112; *Phoenix F. Ins. Co. v. Philip*, 13 Wend., 81.) Our courts followed, of course, the common law, which was supposed to differ from the practice of the civil and ecclesiastical courts. The *nisi prius* decisions in the English courts, although not in entire harmony (*Allesbrook v. Roach*, 1 Esp., 351), and much criticised by the text writers, were generally hostile to the admission of comparison by experts, until, by the act of parliament in 1854, such evidence was declared legitimate (*Stranger v. Searle*, 1 Esp., 14; *Clermont v. Tullidge*, 4 Car. & P., 1; *Rex v. Cator*, 4 Esp., 117). Even, however, before the passage of that act, a jury was allowed, itself, to institute the comparison, but only with documents in evidence before them and relevant to the issue (*Doe dem. Perry v. Newton*, 5 Ad. & Ell., 514; *Solita v. Yarron*, 1 Moo. & Rob., 133; *Griffiths v. Williams*, 1 Cro. & Jer., 47; *Bromage v. Rice*, 7 C. & P., 547).

In *Doe v. Suckermore*, decided in 1836, the whole subject received very great consideration, four judges of the King's bench delivering elaborate opinions, reviewing the cases very fully, and discussing very thoroughly the principles upon which evidence of this character should be received or excluded. The rule seemed to be conceded in that case by all the judges, that as to any but ancient writings, an opinion formed upon a mere comparison of hands at the trial *eo instanti*, was not admissible, but they were equally divided upon the question whether a knowledge of the handwriting might be obtained by a skilled person sufficient to render him a witness competent to speak as to the genuineness of the signature merely by a previous examination of other signatures proved to be genuine (*Lord Denman*, Ch. J., 5 Ad. & Ell., 737; *Williams, J., id.*, 718). This distinction is admitted to be subtle, but seems to have prevented the concurrence of these two judges with Coleridge and Patterson, JJ., in refusing the rule for a new trial. It is to be observed that the decisions to which I have referred were as to evidence of experts, that a signature was or

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was not that of the party whose it purported to be. Upon the question, whether a signature upon its bare inspection alone appeared to be simulated and not natural, persons professing the skill to speak have been more often admitted, although this species of evidence has been declared not entitled to any credit (L'd Denman, 5 Ad. & Ell., supra).

In our own state, the legislature has not interfered as in England, but the courts have in their later decisions shown a disposition to relax the rule. It has been conceded here that while documents could not be put in evidence for the purpose of comparison, yet, as in the English courts, those, which were in for other purposes, might be compared with the disputed signature by the jury (T. A. Johnson, *J. Van Wyck v. McIntosh*, 4 Kern., 439; Leonard, Com. *Randolph v. Loughlin*, 48 N. Y., 456); and in *Dubois v. Baker* (30 N. Y., 355, 361), the majority of the judges held evidence admissible which cannot in principle be distinguished from that admitted in the present case. DAVIES, J., indeed, in delivering the opinion expressly says "a comparison of the handwriting of papers introduced and relevant is permitted, to ascertain the genuineness of the one in controversy;" and MULLEN, J., though dissenting on other grounds concurred in this (30 N. Y., 366).

Although this decision lays down, as has been already intimated, a somewhat more liberal rule as to evidence of handwriting than had previously prevailed in this state, yet it has been generally acquiesced in, is in conformity with the law in other states, and seems to have become an established practice in the trial courts. (See *Goodyear v. Vosburgh*, 63 Barb., 154; *Johnson v. Hicks*, 1 Lans., 160; *Roe v. Roe*, 40 Superior Court (8 J. & S., 1).

We are very strongly of the opinion that it is sounder in principle than the more narrow one, and in no respect an infringement upon any wholesome and just limitation of expert testimony.

Evidence of handwriting, it is universally conceded, may be opinion merely. It is as universally conceded that a witness who has either never seen the party write, or who, not having seen him write, has received letters from him which have been "acted upon" by him as genuine, is competent to give

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an opinion as to his handwriting. And this competency is not affected by the lack of frequency of observation, the length of time which has elapsed since the writing was seen, or the slightness of the correspondence, although the weight of the opinion will of course depend much upon these circumstances.

From what in these cases is the opinion derived, if not from a mental comparison of hands? The signature is presented to the witness and his only means of forming an opinion upon it is by recalling with more or less distinctness to his mind images of the signatures he has either seen made or attached to letters received, and comparing them with the one presented for his opinion. This is certainly a "comparison of hands" and in my judgment no favorable distinction as to accuracy or safety can be made between such a mental process and that of the expert who has become quick by practice in detecting identity of hands, and also compares in his mind and with his eye the one in question with other signatures as certainly genuine as those which the ordinary witness has seen written or received in letters. The comparative weight of the two kinds of evidence is not the question under consideration. The opinion of the ordinary witness, founded only upon a mental comparison of the disputed writing with a single signature seen by him twenty years before, would be worth little, but it would undoubtedly be competent (*Jackson ex. dem. v. Van Dusen*, 5 Johns., 144; *Eagleton v. Kingston*, 8 Ves., 473). So the opinion of an expert founded upon a comparison with but one or two genuine signatures should not perhaps be regarded as of much value, but it still has every claim, in principle, to competency possessed by the other. Nor does the distinction sought to be raised by Lord Denman in *Doe v. Suckermore* (*supra*) between an opinion of an expert who has previously examined other genuine signatures put in evidence and then is called to speak as to genuineness from his knowledge of the signature thus gained, without actual comparison before the court, and one given upon an examination or comparison in court of the signatures and without any previous knowledge, seem on scrutiny to be well grounded or practicable. It would be impossible to draw a line between these processes. It is undoubtedly true that the opinion as to handwriting should depend

not so much upon mathematical measurements and minute criticisms of lines, nor their exact correspondence in detail, when placed in juxtaposition with other specimens, as upon its general character and features as in the recognition of the human face. But in the case of one expert, his mental image or idea of the genuine handwriting may become as clear and vivid and accurate by an examination of the other signatures on the instant as in the case of another of less practice or quickness of perception after hours or days of study. The amount of knowledge gained by this study and the length of time and frequency of opportunity to gain it affect the weight of the evidence as in the case of the ordinary witness, but cannot properly decide its competency.

The principal objections which have been raised to the comparison of hands are two: First, the introduction of numerous and distracting collateral issues as to the genuineness of the signatures to be compared. As to each one of these, it is said there might be the same controversy as with regard to the original signature, and the further introduction of the comparison of hands and so the number of issues to be decided be without end. But this objection seems tolerably met by the restriction of the signatures to be compared to those necessarily or properly proved in the case as relevant evidence for other purposes and upon the genuineness of which, if there is any controversy about them, the jury must pass in any event. This limitation, it must be conceded, is not very philosophical or logically satisfactory, but is justified by the necessity of the case, and at all events answers the objection of collateral issues. Second, the second objection to the comparison of hands is that no man writes always the same signature and the specimens will be unfairly selected as being unlike or like the signature in dispute according to the interest of the party producing them. They will not be fair average specimens of the general character of the handwriting (Dallas, C. J., *Burr v. Harper*, Holt, N. P. C., 44). That, consequently, the expert, to whom they are submitted, will have no opportunity of obtaining an accurate notion of the ordinary natural hand; and as illustrative of this objection, the decision of Lord Kenyon is cited, who refused to allow a witness to give an opinion, whose only knowledge was from the signatures he

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had seen the party himself write for the avowed purpose of showing his true manner of writing (*Stranger v. Searle*, 1 Esp., 14). The force of this objection also is, I think done away by the restriction of the rule to signatures relevant in the cause for other purposes and as to which therefore there could hardly be any selection of the signatures for the purpose of comparison.

On the whole, therefore, I am inclined to concur in the soundness of the doctrine upon this point contended for in the most approved text writers upon evidence. "It cannot be denied" says Mr. Starkie (*Starkie on Evi.*, vol. 2, p. 375), "that abstractly a witness is more likely to form a correct judgment as to the identity of handwriting, by comparing it critically and minutely with a fair and genuine specimen of the party's handwriting than he would be able to make by comparing what he sees with the faint impression made by having seen the party write but once, and then, perhaps, under circumstances which did not awaken his attention." "When other writings" says Prof. Greenleaf (*Greenl. on Evi.*, § 578), "admitted to be genuine are already in the case, here comparison may be made by the jury with or without the aid of experts." (See also, *Phillips on Evi.*, vol. 1 [6th ed.], 472; *Evans' note to Pothier on Contracts*, 2 *Evans' Pothier*, p. 185.)

My conclusion is that there was no error in the admission of the evidence of experts before the referee.

The counsel for appellant insists here that the witnesses called by the defendants as experts were not qualified as such, but no such objection was taken upon the trial. These witnesses were, however, we think, shown to be sufficiently competent to give the opinions upon handwriting. They had been engaged in occupations in which it was their duty to scrutinize handwritings and detect forgeries and had acquired more or less skill by practice.

All concurred, except ANDREWS, J., absent.

Judgment affirmed.

People v. Severance, 67 Hun, 182.

PEOPLE v. SEVERANCE,

N. Y. Supreme Court, Fourth Department, 1893.

[Reported in 67 Hun, 182.]

A witness who has no knowledge of the handwriting of a person except from seeing a signature that has been proved on the trial to be genuine, cannot, even though an expert, be asked directly as to the genuineness of the signature in issue ; but should be confined to comparing the two writings and giving an opinion as to whether they were written by the same person.

The defendant was indicted for making a false entry in an account book of a corporation, while an officer thereof, with an intent to defraud.

Upon the trial for the purpose of proving that defendant had made the false entries, the people called one Myers. He testified that he had never seen the accused write, but gave testimony to show he was an expert as to handwriting. The witness was then shown a paper which contained a signature which had been proved to be the accused's, and a second paper being handed him, he was asked by the prosecution :

Q. In your opinion as an expert, was the writing upon that [paper] done by the same person that signed this signature ?

Objected to as an improper method of proving handwriting. Overruled and exception to defendant.

A. It is in Mr. Severance's handwriting.

Defendant's counsel moved to strike out the answer as not responsive. Denied ; defendant excepts.

The witness subsequently testified in detail that numerous writings shown him were "in Mr. Severance's handwriting."

Further facts appear in the opinion.

At the Court of Sessions, the defendant was convicted.

The General Term of the Supreme Court reversed the judgment.

MARTIN, J. [*after passing on another question*] : The people also called as a witness one Lawrence W. Myers, who claimed to be an expert both in bookkeeping and as to handwriting. He

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testified at great length, not only as to the propriety of the manner in which the books of the bank were kept, but was permitted to testify unqualifiedly that a great many papers and entries in the books were in the handwriting of the defendant, although it was shown by the undisputed evidence that he had never seen the defendant write, and there was evidence but a single signature that was proved to be that of the defendant.

On the occasions referred to, of which there was a great number, he was, in substance asked: "Is the writing I show you in defendant's handwriting?" These questions were objected to by the defendant on the ground, among others, that the witness was not qualified to testify on that subject. These objections were overruled, and the defendant duly excepted.

The writings were then offered in evidence without any other proof as to their having been made by the defendant, to which he duly objected, and they were admitted by the trial court under his objection and exception. The propriety of admitting such proof of the defendant's handwriting and then admitting in evidence the writing, with no other proof of its genuineness, is sharply presented by the various objections and exceptions made and taken by him. Indeed a large portion of the written evidence received against the defendant was verified in this manner only. The people attempted to justify these rulings under the provisions of the statute which provide that comparison of a disputed writing, with any writing proved to the satisfaction of the court to be genuine, shall be permitted to be made by witnesses in all trials and proceedings, and such writings, and the evidence of the witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness, or otherwise of the writing in dispute. (Laws 1880, chap. 36, § 1.)

It may be observed that this statute only permits a comparison to be made by a witness of a disputed writing with any writing proved to be genuine, and the submission of such writings, and the evidence of such witnesses to the court and jury, as evidence of the genuineness or otherwise, of the writing in dispute. Although this statute permits the comparison of a genuine handwriting of a person with that of a disputed instrument, we find in it no authority which would justify a court in permitting a witness to

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testify to the handwriting of a person, when he had no knowledge of its genuineness, except from having seen a signature that was proved to be genuine. In this case, the witness had never seen the defendant write, nor was there any claim that he had ever received documents purporting to be written by defendant, in answer to documents written by the witness or under his authority, or that, in the ordinary course of business, documents purporting to be written by the defendant had been habitually submitted to the witness.

As this witness was not qualified to give evidence as to the handwriting of the defendant, except as he compared the writings in dispute with the one proved to be genuine, he should not, we think, have been permitted to testify positively, that these different entries and papers were in defendant's handwriting. His evidence should have been confined to a comparison of the handwriting of the genuine paper with the handwriting of those in dispute, and to his opinion that they were or were not written by the same person. Upon such an examination, the jury would have readily understood that his evidence was confined to a comparison of the writings, and his opinion was based thereon, which would naturally have given it less weight than his positive testimony, when the fact that he had no knowledge of the defendant's writing, except by such comparison, might have been easily forgotten by the jury. Such proof was all that was justified by the statute, and all that should have been allowed. He was also permitted to testify that a paper was in the defendant's handwriting which was not presented to the court or jury, and which he had not seen since the standard offered in evidence was proved to be genuine, and upon this proof he was then permitted to give secondary evidence of the contents of such paper. We think the admission of this evidence, in the form in which it was given, was error.

[Other rulings are here omitted.]

All the judges concurred; MERWIN, J., in result.

Judgment reversed.

Sudlow v. Warshing, 108 N. Y., 520.

SUDLOW v. WARSHING.

New York Court of Appeals, 1888.

[Reported in 108 N. Y., 520.]

In an action involving the genuineness of a deed, the plaintiffs denied the genuineness of the signatures thereto, but testified that they bore a resemblance to their signatures and to those of the other grantors, and one of them testified that what purported to be his signature to the deed was a fair imitation. *Held*, not error to allow an expert in handwriting, called by defendants, to be asked what evidence, if any, he found in the signatures to the disputed deed, of their being "simulated imitations instead of genuine signatures."

Action of ejectment by heirs-at-law. The defense set up a deed by the widow and heirs-at-law to defendant's grantor. The issue tried was whether this deed was a forgery.

Upon the trial testimony was given by plaintiffs that the signatures on the deed bore a resemblance to their signatures, and one of them testified that what purported to be his signature was a fair imitation.

Daniel T. Ames, an expert in handwriting, was afterwards called by the defendants and asked: "What evidence, if any, do you find in the signatures to the disputed deed, of their being simulated instead of genuine signatures?"

Objected to as immaterial and incompetent.

Objection overruled and exception taken.

A. "None, whatever."

At Trial Term judgment was entered for defendants.

The Court of Common Pleas at General Term affirmed the judgment without opinion.

The Court of Appeals affirmed the judgment.

GRAY, J. [*after stating the facts*]: Plaintiffs excepted to the allowance of this question and based their exception on the case of *Kowing v. Manly*, decided by this court in 1872 (49 N. Y., 192). What was precisely decided in that case was, that where the plaintiff had not introduced any evidence to show that a paper, produced and relied upon by the defendants, was in a simulated

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handwriting, but had merely testified that it was not written by him, it was not competent for the defendants to offer evidence to prove that the paper was in a simulated handwriting.

In the present case a state of facts is presented which did not exist in the case cited. Here two of the grantors in the deed were dead, namely, the widow and a son of John W. Sudlow. These plaintiffs, while denying the genuineness of the signatures to the disputed deed, testified that they bore a resemblance to their signatures and to those of the deceased grantors, and, in at least one instance, the witness testified to the signature being a fair imitation of his own. Comparisons of the disputed deed with other writings, conceded to be genuine, were also made through the witnesses. That was sufficient to warrant the allowance of the question.

In *Miles v. Loomis* (75 N. Y., 288), it was decided that it was competent for experts, upon a comparison of signatures without any other knowledge of testator's writing, to express an opinion as to whether the disputed writing appeared a natural or simulated hand. Since the decision in *Kowing v. Manly*, Chapter 36 of the Laws of 1880, was passed, by which the rules of evidence in respect of disputed handwritings were enlarged beyond what had been permitted under then existing rules (*Peck v. Callaghan*, 95 N. Y., 73).

DRESLER v. HARD.

New York Court of Appeals, Second Division, 1891.

[Reported in 127 N. Y., 235.]

Where a material word in a writing is obscure, expert opinion is competent as to what such word is, based on a comparison of such instrument with other exhibits in the case in the handwriting of the same person.

Plaintiff sued to recover moneys paid toward the purchase price of stock, to defendants, who, on their part, alleged delivery of the stock.

The defendants offered in evidence a receipt in the handwrit-

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ing of defendant, Blauvelt, signed by plaintiff; a dispute arose over a material fact, whether the date of the receipt was January or July, the abbreviation being "Jay" or "Juy." To support their contention that the date was January, defendants introduced in evidence various papers relating to transactions between the plaintiff and the defendant Blauvelt, in the latter's handwriting.

Other material facts appear in the opinion.

At Trial Term, plaintiff had a verdict.

The General Term of the Superior Court affirmed the judgment.

They were of opinion that, although an expert might give his opinion of the handwriting, he could not be asked whether the date was January or July, as it was the office of the jury to find what the date was.

The Court of Appeals reversed the judgment.

POTTER, J. [*after stating the facts*]: The defendant called an expert to show that the date of the receipt was "January," and not "July." For that purpose the defendant asked this question: "Will you state from the examination which you have made of Exhibit B, and of the comparison you have made between the handwriting of that and the handwriting on these other exhibits, in Mr. Blauvelt's handwriting, what your opinion is with reference to that date on that paper?" This question was objected to by the plaintiff, but not upon any specific ground. The court excluded the question, manifestly upon the ground that the question calls for the opinion of the witness as to what the word or characters mean.

To make the point of the proposed evidence and ruling more precise, the defendants' counsel asked this question: "Q. I ask you to compare it with the exhibit you have in your hand, and then I desire to ask the question again whether, in your opinion, the word written at the heading of defendants' Exhibit B, in the place of the date, is January or July;" which, upon plaintiff's objection, was also excluded. The defendants' counsel excepted to the rulings.

We think the learned trial judge erred in excluding the evi-

dence. We will assume, as stated in the language of the court, that the object of the proof was to show by the witness what the words and characters indicating the date of the receipt were. The principle involved is whether it may be shown what the word in a written instrument is. To a person or a juror (if we may suppose the latter case) who can neither read nor write it is indispensable that someone who can should be allowed to testify what the words are. This course would be necessary in such case, however plainly written or printed the word might be. Upon the same principle it is allowable for the jurymen, who are perhaps only moderately skilled in letters and words, to determine what the letters and characters are, and what word they make. The jurors may do this from the knowledge they already possess and such as they gain during the trial by the reading and the comparison they make with other writings already introduced in evidence. Indeed, the court held in the opinion in this case at general term that the jury might compare the receipt in question with the dates and letters in the note and the other writings to determine the date of the receipt. If such comparison may be made by unskilled jurymen, why should they not be aided and enlightened, as they may be in analogous cases of the genuineness of handwriting, alterations, and assimilations, by men who have made the subject of handwriting a study, and have obtained skill and proficiency in that branch of knowledge. As no objection was made that the witness was incompetent it must be assumed that he was qualified as an expert to give his opinion, and the grounds of it, in aid of the jury. *Van Wycklen v. City of Brooklyn*, 118 N. Y., 424, 429, and the cases there cited; *Masters v. Masters*, 1 P. Wms., 425; *Rogers on Exp. Test.*, § 128.

If we analyze the practical processes which have to be gone through with in order to elicit and apply this kind of evidence, whether from experts or lay witnesses, we shall find that the witness is required to examine and determine what the letters and characters or even hieroglyphics are, and what word they form in combination. The word thus formed may be in a native or foreign language; and, if it is foreign, then another process is yet to be gone through with before it can reach the appre-

Dresler v. Hard, 127 N. Y., 235.

hension of the lay mind, and that is, to interpret its meaning into the native language of the juror. The testimony of expert witnesses frequently exemplify one or both of these processes, and are of common use in the investigations carried on in courts of justice, and in other avocations. It often becomes necessary and pertinent in judicial proceedings to introduce foreign laws, and to interpret their meaning to the comprehension of the juror not familiar with the foreign language.

We think these views are abundantly supported by adjudicated cases. In *Sheldon v. Benham*, 4 Hill, 129-131, a skilled book-keeper was allowed to show the words indicated, and the meaning of certain characters and abbreviations of entries made by a deceased officer of the bank. In the opinion in that case Judge BRONSON says: "I see no objection to the testimony of the book-keeper in relation to these memoranda. He was not called to give a construction or to declare the legal effect of a written instrument; but, as a person skilled in such matters, to tell the jury what words these short entries stood for. It is not unlike the case of an instrument written in a foreign tongue, where a translator may be called in to tell the jury how the instrument reads." "Where the difficulty arises from the obscurity of the writing itself—*e. g.*, if it be illegible from lapse of time, accident, etc.—one skilled in deciphering may be called; as, for instance, a clerk from the post-office. Greenl. Eq. Ev. 198, 199; (Phil. Ev. Cow. & H. Notes), 1419." "The very point arose in *Armstrong v. Burrows*, 6 Watts Rep., 266. There the parties on a trial in the common pleas differed about the date of a receipt, which had been rendered illegible; the one contending that it was dated 1823, and the other that the date was 1824." In *Vinton v. Peck*, 14 Mich. 287-290, the question was whether the note had been altered from "eight" to "eighty." An expert engraver was allowed to testify from comparison with the genuine writing whether an "8" was altered from a "3." In that case the court said: "It is very true that the jury may examine the paper for themselves, and that opinions are not usually admissible, where the jury can form their own conclusions unaided. But we do not think it would be safe in this country to adopt a rule which assumes such a degree of knowledge and skill among

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jurors. Even reasonably expert writers may obtain valuable aid from experience in such questions, as neither law nor custom requires our jurors to meet any standard of education, we think that to exclude such aid would lead to absurd results. The most enlightened courts have availed themselves of such assistance, and we deem it wise to use it in all cases where it is at hand. It can do no harm, and at all events must often be indispensable to justice." In the case of *Stone v. Hubbard*, 7 Cush. 595, it was held in a case where the date of a note was doubtful, it being uncertain as to whether the last figure was a 4 or a 2, the plaintiff was entitled to call experts, and ask their opinion, "for the purpose of aiding the court and jury in arriving at a true reading of the document." Expert testimony upon the same subject as in this case, as to whether the figure was an 8 or a 3, was admitted in the case of *Norman v. Morrell*, 4 Ves., 770.

All the judges concurred.

Judgment reversed.

KOWING v. MANLY.

New York Court of Appeals, 1872.

[Reported in 49 N. Y., 192.]

Upon an issue as to the genuineness of a signature, after the person whose signature it purports to be, had only testified to the fact that it was not his signature, *held*, not error to exclude expert evidence as to whether or not the signature was in a simulated hand.

Kowing sued Manly and another, to recover the value of certain bonds. On the trial it appeared that defendants, who were brokers, bought these bonds for plaintiff, who left them in their keeping with directions not to deliver them except on his written order; that plaintiff's wife had thereafter obtained the bonds on an order purporting to be made by her husband. Plaintiff claimed that the order was a forgery.

Upon the trial, Abraham C. Dayton, defendant's cashier, was called by defendants and testified on direct examination: "From my observations of signatures I can tell whether a hand is simulated or not, or is a natural handwriting, where I am

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familiar with the signature; I can tell whether it is an attempted forgery."

Q. "From your knowledge of signatures can you say whether the signature to order, Exhibit 3, is in a simulated handwriting?"

Objected to by plaintiff's counsel, objection sustained and exception taken.

At Circuit, a verdict was rendered for plaintiff, the exceptions to be heard at General Term.

The Supreme Court at General Term entered judgment for defendants without passing on the point.

The Court of Appeals reversed the judgment.

RAPALLO, J., [*on this point*]: We think that the evidence offered to prove that the order produced by the defendants was not in a simulated handwriting was properly rejected. The plaintiff had not introduced any evidence to show that it was in a simulated handwriting, but had testified to the fact that it was not written by him. It was incumbent upon the defendants to prove that the order was in the handwriting of the plaintiff; and we do not think that, as the evidence stood, the opinion of an expert, that the signature was not in a simulated hand, was competent for the purpose of establishing that it was the plaintiff's. In the cases cited (3 B. Ch. 325, and 17 Pick., 490), for the purpose of proving that a mark or signature was not genuine, evidence of experts was admitted, to show that the writing was simulated. The only case cited in which evidence was admitted to show that the writing was not simulated is that of *People v. Hewit* (2 Park. Cr. Rep., 20), where, on the trial of an indictment for forgery, the prisoner was allowed to prove by an expert that the signature was not in a simulated hand. Whatever effect might be given to such evidence in a criminal trial for counterfeiting or forgery, as to which we express no opinion, we do not think it competent for the purpose of proving the genuineness of a signature against a party sought to be charged thereby.

The judgment appealed from should be reversed, and judgment entered for the plaintiff on the verdict, with costs.

All concur.

Note on Proof by Expert.

NOTES OF CASES ON EXPERT TESTIMONY TO
ESTABLISH GENUINENESS.

Kentucky: *Fee v. Taylor*, 83 Ky., 259 (experts not acquainted with the handwriting of the person whose signature is disputed cannot testify by comparison of handwritings that the contested paper is not genuine, unless the disputed paper is ancient or the standard of comparison is in evidence or its genuineness is admitted). *Illinois*: *Rogers v. Tyley*, 1892, 32 Northeast. Rep., 393 (where other writings admitted to be genuine are already in the case, whether such writings and the disputed writing were written by the same person is a proper subject for expert evidence). *New York*: *Hadcock v. O'Rourke*, 6 N. Y. Supp., 549; s. c. 25 State Rep., 55 (there is no rule which confines the testimony of an expert as to handwriting who has no knowledge of the handwriting of the person whose writing is disputed to statements as to the characteristic of the several writings submitted to him for comparison, their resemblance and dissimilarity and which does not allow him to state whether the disputed signature is genuine or not). *People v. Severance*, 67 Hun, 182; s. c. 51 State Rep., 399; 22 N. Y. Supp., 91 (an expert should not be permitted to testify positively that the disputed writing and the instrument used as the standard of comparison were written by the same person; his testimony should be confined to a comparison of the handwritings, and the expression of his opinion as to whether or not the writings were by the same person). *Ohio*: *Bell v. Brewster*, 44 Ohio St., 696; s. c. 10 Northeast. Rep., 679 (comparison of writings may be made not only by witnesses who have knowledge of the handwriting of the person who purports to have written the disputed document, but also by persons who are skilled in handwritings generally called experts). *Pennsylvania*: *Rockey's Estate*, 155 Pa. St., 453; s. c. 26 Atlantic Rep., 656 (a mere expert cannot give his opinion as to comparison of signatures; such comparison is for the court or jury). *Utah*: *Tucker v. Kellogg*, 8 Utah, 11; s. c. 28 Pacific Rep., 870 (an expert may testify as to his opinion formed by comparison of signatures admitted to be genuine with the signature in question, irrespective of the fact whether genuine signatures are already in evidence for other purposes). *Virginia*: *Hannot v. Sherwood*, 82 Va., 1 (a skilled expert may testify from comparison as to the handwriting of another).

Hynes v. McDermott, 82 N. Y., 41.

HYNES v. McDERMOTT.

New York Court of Appeals, 1880.

[Reported in 82 N. Y., 41.]

An expert cannot testify as to the genuineness of a disputed signature, from comparing with it merely photographic copies of genuine signatures; but the originals to be compared should be before him when he testifies.

A hired agent employed to get evidence in the cause who has formed an opinion as to the genuineness of a disputed signature, by comparison with specimens selected for the purpose by him or the party employing him, cannot, though an expert, testify to such opinion.

Action of ejectment by the alleged widow and sons of William R. Hynes, deceased.

Upon the trial, William J. Loader, a detective, was called by defendants to prove that a lease to one Elizabeth Saunders was signed by plaintiff in that name, after her alleged marriage to Hynes. The witness testified he had been employed by the defendants in connection with the case, and that he had been present at the taking of a deposition in England, where certain signatures had been produced.

He was then asked by defendant's counsel:

"Q. Was Mrs. Hynes [plaintiff] present at the time of the examination? A. She was.

Q. Do you know whether she looked at the signatures or not? A. She did.

Q. What did she say as to who wrote the name in the signature book? A. When the signature of Elizabeth Hynes was produced, the bank manager said that he had written "Victoria Villa" himself; and she said, "Yes, I wrote Elizabeth Hynes." And we turned back then to the signature of Elizabeth Saunders, and the manager said, "The lady present wrote the whole of that; I did not write any of it," and she said, "I did."

Q. You saw the two signatures? A. I did.

Q. Elizabeth Hynes and Elizabeth Saunders, in the signature book to which you have referred? A. I did.

Q. Were there copies taken of those signatures? A. There was.

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Q. These are the copies that are annexed to the testimony of Mr. Brewer of the bank? A. Yes; they are annexed to the testimony of Mr. Brewer.

Q. Did you make an examination of the two signatures which Mrs. Hynes on that occasion stated she wrote? A. I did.

The witness then stated he had had experience in the examination of handwritings, and was further asked :

Q. Now state, from your knowledge of the handwriting of the plaintiff, Mrs. Hynes, acquired in the manner you have stated, in whose handwriting the signatures to the paper marked No. 1 for identification is?

Objected to by plaintiffs' counsel. Objection sustained on the ground that the witness had not shown that he had seen Mrs. Hynes write her signature, or had ever received any letters signed by her, or had shown in any way that he was acquainted with her signature. To which ruling defendant's counsel excepted."

At Circuit, judgment was entered for plaintiff.

The Court of Common Pleas at General Term affirmed the judgment.

The Court of Appeals affirmed the judgment. FOLGER, Ch. J. [on this point]: The court did not allow the witness, Loader, to testify that the handwriting of the signature to the lease of the premises in Leverton street was that of the adult plaintiff. The witness had never seen her write; he had no knowledge of her handwriting save that got by looking upon two writings other than the signature to this lease, which other writings she had acknowledged in his presence and with the writings then before them, to have been penned by her. Those other writings were two signatures of names of persons and one written name of a place of residence, as shown by a signature book kept by a bank at which she had opened two accounts of money deposited by her. These writings were not in evidence in the case; that is, they were not produced before the jury and kept in court throughout the trial. The witness who controlled them was examined beyond the seas on commission. He produced them be-

fore the commissioner, but refused to part with them. Copies were taken in manuscript by the commissioner and annexed to the deposition of the witness. Copies were also taken by the photographic process and certified by the commissioner and annexed to the deposition of the witness. The witness, Loader, was presented to the court as doubly competent to speak on an issue as to the genuineness of handwriting,—as an expert, and as having personal knowledge of the handwriting of the adult plaintiff. It does not appear from the case that the trial court determined whether he was qualified to speak as an expert. We will assume that he was, and that had the trial court thought it needful to pass upon the question, it would have held that he was. Yet, in our judgment, it was not proper to receive his testimony as that of an expert, and by a comparison of writings.

An expert in handwriting, when speaking as a witness only from a comparison of handwriting, that is, with two pieces of it in juxtaposition under his eye, should have before him in court the writing to which he testifies and the writings from which he testifies; else there can be no intelligent examination of him either in chief or cross; nor can there be fair means of meeting his testimony by that of other witnesses. This requirement is included in the rule that there can be no comparison of handwriting, unless the pieces of writing by which comparison is made are properly in evidence in the case for some purpose other than that of being compared (*Randolph v. Loughlin*, 51 N. Y., 456; *Dubois v. Baker*, 30 *id.*, 355; *Miles v. Loomis*, 75 *id.*, 288). The nearest approach to having before the witness at the trial the writings by which comparison had been or was to be made, was the bringing of the photographic copies. There was no proof of the details of the process by which they were taken, nor as to accuracy of the work. We think that a comparison of a signature in dispute, with such photographic copies of other writings, for the purpose of allowing an opinion from an expert as to the character of the signature, as real or feigned, when the originals, from which the copies are made, are not brought before the jury, and may not be shown to other witnesses, ought not to be permitted. Photographs that have been taken of persons found dead have been admitted in evidence in this state, in

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aid of other proofs of identity, but not alone. They were characterized as slight evidence in addition to other and more reliable testimony (*Ruloff v. People*, 45 N. Y., 213). A photographic picture was more unreservedly admitted as evidence upon the question of identity of person in *Udderzook v. Commonwealth* (76 Penn. St., 340). And in another case when the genuine signature and the disputed signature were both brought into court, magnified photographic copies of each, together with the originals, were submitted to the inspection of the jury, and it was held not to have been error (*Marcy v. Barnes*, 16 Gray, 162). But copies of letters in a letter-book produced by impress, or by a machine, have been rejected (*Comm. v. Eastman*, 1 Cush., 189). It would be carrying the matter much farther, to permit an expert to compare photographic copies of signatures, and therefrom to testify as to the genuineness of a disputed signature. We may recognize that the photographic process is ruled by general laws that are uniform in their operation, and that almost without exception a likeness is brought forth of the object set before the camera. Still, somewhat for exact likeness will depend upon the adjustment of the machinery, upon the atmospheric conditions and the skill of the manipulator. And in so delicate a matter as the reaching of judicial results by the comparison of writings through the testimony of experts, it ought to be required that the witness should exercise his acumen upon the thing itself which is to be the basis of his judgment; and still more, that the thing itself should be at hand, to be put under the eye of other witnesses for the trial upon it of their skill. The certainty of expert testimony in these cases is not so well assured as that we can afford to let in the hazard of errors or differences in copying, though it be done by howsoever a scientific process. Besides, as before said, there was no proof here of the manner and exactness of the photographic method used. It was right not to receive Loader's evidence as that of an expert.

The witness was also offered as one having acquaintance with the handwriting of the adult plaintiff. All his means of knowledge have been stated. The testimony was finally rejected, after the objection made to it, that it was a collateral fact whether the lease was signed by the plaintiff, and that the defend-

ants had proved by her that she had not signed it. The objection is not well put, in claiming that the defendants proved by the plaintiff that she did not sign the lease. At one time she said that she did not recognize the signature to it as hers; but she would not say that it was not hers, while she would not admit that it was. At another time she was explicit in denial. But her testimony on this head was not conclusive. Neither can we assent that the fact sought to be proved was a collateral fact, in a sense that precluded the defendants from offering any other testimony upon it than that of the plaintiff herself. She was the witness of the defendants, to be sure, and they could not impeach her. But if she was mistaken in her testimony, or forgetful, so that she could not speak as to a matter, the defendants were not shut out from proving the fact, if material, by other witnesses. It was material, if this plaintiff, during the time that, as she now claims, she was the wife of Hynes, and entitled and bound to bear his name, was entering into written contracts in another name which was that of the wife, or widow still unmarried, of another man. The testimony offered tended to prove that. We think, therefore, that that objection was not good. The prior objection was in effect that Loader had not shown that he was acquainted with the signature of the plaintiff. Testimony as to handwriting is testimony of opinion. Any person acquainted with it may be permitted to give his opinion of it. The acquaintance need not come from having seen the person write. It may be formed from seeing writing under such circumstances as put it beyond doubt that it was a true signature. In this case the witness, Loader, had seen writing admitted by the plaintiff to be hers; thus he had seen her genuine handwriting. If the case was confined as that the correctness of the holding at the circuit would hang upon whether the view of one piece of genuine handwriting would qualify one to speak as a witness as to the genuineness of another and a disputed signature, we find authority to show that a holding rejecting the testimony would be incorrect (*Hammond v. Varian*, 51 N. Y., 398; *Garrells v. Alexander*, 4 Esp. Cas., 37). The competency of a witness is not determined by the degree of his knowledge. If he has had means of becoming acquainted with the handwriting in question,

he is competent to speak, and the weight of his testimony is for the jury. The objection, however, was broader than that, and covered all the circumstances in which Loader had been placed with regard to this handwriting. It appeared that he was by calling a private detective, and had gone to England as such in the employ of the defendants, after the commencement of this action; that it was while in the pursuit of evidence against the plaintiffs that he learned of this bank-book writing; and while engaged in taking the evidence in behalf of the defendants of a witness on commission, that he saw the writing and heard the admission of the plaintiff that it was made by her. His acquaintance with her handwriting was from an examination of these two pieces of it, and it was formed while he was, as a hired agent, in quest of testimony with which to combat the plaintiff's case, and of testimony to be made from the handwriting of the adult plaintiff. It is not to be distinguished from a case of genuine writings furnished to a person to enable him to become a witness as to a disputed signature. It is clear that if the genuine writings had been made or chosen for his inspection by the party who called him as a witness, so as to qualify him to speak, his testimony, to be based upon an acquaintance got from a view of them, would not be received (*Stranger v. Searle*, 1 Esp. N. P. C., 14; *Tome v. Parkersberg R. R. Co.*, 39 Md., 36; s. c. 17 Am. Rep., 540). And it has been held at *nisi prius*, that when the acquaintance is formed from the view of writings admitted by the attorney of the writer to be genuine, the witness will not be allowed (*Greaves v. Hunter*, 2 Carr & Payne, 477). Though, on the other hand, when the genuine writing from which the witness got his knowledge was to a paper filed in the cause by the opposite party, the testimony was allowed (*Smith v. Sainsbury*, 5 Carr & Payne, 196). These cases exemplify how lacking in uniformity are the rulings on this matter, and how delicate a question it is to handle. The last two cases are not directly in point, inasmuch as it did not appear that the witness, when he saw the genuine writings, was seeking the means of making acquaintance, so that he might testify therefrom. A difference between the case in hand, and those cited above from *Espinasse* and the *Maryland Reports*, is that in the

Note on Photographic Copies.

latter two, the genuine signatures were made or chosen by the parties who wished it to appear to the witness that the disputed signature was unlike the genuine ones inspected by him; while in the former, the genuine signature is used in the case, and is admitted to be genuine by the party against whom the witness is called. Still, it is a case of signatures selected in the interest of the party who calls the witness. They were pitched upon by the witness himself who, in the hire of the party, had been sent in quest of hostile evidence, and that after the commencement of the action. All the stimulus upon him, and all the impulses of his calling, were against impartiality in selection of specimens. The distinction is taken in *Fitzwalter Peerage Case* (10 Cl. & Fin., 193), between the testimony of a witness who, intending to be a witness, has inspected genuine documents, for the purpose of forming an acquaintance with the characteristics of a certain handwriting, and that of one who, in the course of business without having in view the being a witness, has used the same documents, and thus got an acquaintance. In our judgment, the evidence is open to the objections that have been held fatal to testimony as to handwriting, created *post litem motam*. We think that upon all that transpired on the trial in the testimony of Loader, and the objections made, the trial court erred not in ruling out the question.

The legislature of this state has, this year (Laws of 1880, chap. 36), passed an act which is intended to allow proof of signature by comparison of handwritings, and which perhaps will forestall for the future much discussion of this topic. That statute, however, is probably yet to be the subject of judicial interpretation.

NOTES OF RECENT CASES ON COMPARISON BY PHOTOGRAPHIC COPIES.

Indiana: *White S. M. Co. v. Gordon*, Ind., 1890, 24 Northeast. Rep., 1053 (it is not error to exclude an enlarged photographic copy of the disputed signature when offered in evidence for the purpose of comparison with the original; the original being in court, the photograph is only secondary evidence). *Texas*: *Buzard v. McNulty*, 77 Tex., 438; s. c. 14 Southwest. Rep., 138 (in an action upon a contract, a photographic copy

Note on Photographic Copies.

thereof was admitted in evidence without objection ; but there was no evidence how the copy was taken nor whether it was exact reproduction, nor why the original was not produced. *Held*, that the copy could not be used as a standard of comparison as to the signatures of one of the defendants). *Vermont*: *Rowell v. Fuller*, 59 Vt., 688 ; s. c. 10 Atlantic Rep., 853 (enlarged photographic copies of a disputed signature or writing or those used as standards of comparison, may be used by the jury to aid them in comparing and examining the signatures). *Washington*: *Crane v. Dexter*, 5 Wash. St., 479 ; s. c. 32 Pacific Rep., 223 (it is not error to exclude a photograph of the disputed and genuine signatures where the originals are in court and the only object of the photograph was to get all the signatures on paper to facilitate comparison ; and where the trial court refuses to admit enlarged photographic copies of the signatures for the purpose of comparison because the photographs were not taken with sufficient care, the appellate court will not undertake to reverse such ruling).

BANK OF THE COMMONWEALTH v. MUDGETT.

New York Court of Appeals, 1871.

[Reported in 44 N. Y., 514.]

A witness called to prove the genuineness of a signature may not be asked on direct examination "Would you take it against his (the alleged writer's) denial of the signature?" for this is purely speculative.

A witness called to prove the genuineness of a signature, who has stated on cross-examination that he became acquainted with the signature by seeing it to invoices coming to him as a customs officer, may be asked on re-direct whether, and how often, he is called on officially to pass upon the genuineness of the person's signature; for this shows the extent of his knowledge.

When a witness has testified to the genuineness of a signature it is not error to refuse to allow him to be asked on cross-examination, merely for the purpose of testing his knowledge and accuracy, his opinion as to other signatures not in evidence.

An action on a promissory note, discounted by plaintiffs, who sought to charge Mudgett as indorser.

The facts sufficiently appear in the opinion.

At Circuit, judgment was entered for plaintiffs.

The Supreme Court at General Term affirmed the judgment.

The Court of Appeals affirmed the judgment.

LEONARD, C. One Calhoun, a deputy collector of customs, at New York, occupying the same room with the defendant in that department, called by the plaintiff to prove his handwriting, having stated on the direct, that it was his impression that the writing was Mr. Mudgett's, was asked on the cross-examination, "Would you take it against his denial of the signature?" The question was disallowed, on objection by the plaintiff, and the counsel for the defendant excepted.

The inquiry was purely hypothetical, predicated on no known or authenticated fact. It called for belief or an opinion, on a subject as to which no one can be called an expert. Whether answered affirmatively or negatively it would be immaterial. No witness can tell what he would have done in such a case. It calls for mere speculation and vague belief. The answer might

Bank of the Commonwealth v. Mudgett, 44 N. Y., 544.

create some doubt with a weak juror, or be the foundation of an *ad captandum* argument, although wholly immaterial as evidence.

The ruling was very proper.

One Bausch, a witness for the plaintiff, testified that he was an assistant appraiser in the custom house, slightly acquainted with Mr. Mudgett, knew his handwriting, and thought the indorsement to be his. On his cross-examination, he stated that he became acquainted with the signature by seeing it to invoices which came from the custom house. The witness was then asked, on the re-direct, the following question :

“In the course of your official duties, are you called upon to pass and act upon the signature of the deputy collector? (meaning Mr. Mudgett.) A. Every day.

Q. How many times a day? A. It may be from five to sixty.”

The counsel for the defendant objected to each of these questions, and being overruled, excepted.

This examination was material to show the means and extent of the knowledge of the witness, upon which his opinion as an expert was based. It is urged that it calls for a comparison as to the handwriting of different signatures by Mr. Mudgett. That is remotely probable ; but not more so than every opinion on that subject. The evidence also shows the opportunity which the witness has had to form an opinion ; and, for that purpose, the evidence was properly admitted.

Counsel for the defendant produced a number of checks on a bank, which, it was alleged, were drawn by him, and proposed to inquire of certain witnesses whether the signatures to them were in the handwriting of Mr. Mudgett. The court refused to allow the inquiry ; and the defendant's counsel excepted.

It is said that the inquiry was not for the purpose of comparison, which would be inadmissible, nor for exhibition to the jury, but for the purpose of testing the knowledge and accuracy of the witnesses. Two of the witnesses were produced by the plaintiff, and were then on cross-examination. It could be no test, unless other witnesses were also called to prove their genuineness. No precedent can be found for such a test. If allowed to call witnesses to prove these checks, others might be called by the plaintiff.

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iff to prove the contrary. Such a proceeding would involve the trial of an issue wholly collateral to the main question. If the witnesses should pronounce them to be genuine, the evidence would be wholly immaterial, or would then degenerate to a comparison of signatures, and perhaps, to their exhibition to jurors not expert in handwriting. If the witnesses said, on the contrary, they were not genuine, it would be inadmissible to contradict them, on such a collateral issue, by showing that they were in fact genuine. In the aspect in which the evidence was urged, the checks were immaterial as evidence. In any view they were inadmissible.

The question addressed to the other witness (Potter), as to the genuineness of certain other signatures to notes which were made by the defendant, to the certain knowledge of the witness, was for the purpose of comparing them with the indorsement in question. Like the inquiries addressed to the two former witnesses, it was for the purpose of comparison, or raised collateral and immaterial issues.

The principle is sound, that the trial must be confined to the issues in the cause. The case of *Van Wyck v. McIntosh* (14 N. Y., 439) is authority directly applicable, both as to the inquiries sought to be addressed to the two witnesses on the cross-examination and to the one last mentioned, on the direct, fully sustaining the views here expressed.

The judgment should be affirmed.

All the judges concurred.

People v. Murphy, 135 N. Y., 450.

PEOPLE v. MURPHY.

New York Court of Appeals, 1892.

[Reported in 135 N. Y., 450.]

If evidence objected to generally is not, in its essential nature, incompetent, all grounds of objection which might have been obviated if specifically stated must be deemed on appeal to have been waived.

If an expert, after testifying to the handwriting of a paper upon the strength of standards of comparison written by the alleged writer of the disputed writing, is shown upon cross-examination other writings, and asked if they are by the same writer, his answer that they are concludes the cross-examiner, and evidence that they were written by a third person is not competent, for it would draw a collateral matter into controversy.

Whether upon the question of the authorship of an anonymous letter offered in evidence as having been written by a party, specimens of his genuine writing may be used and a comparison made at the trial under N. Y. L., 1880, c. 36, *Query*.

The objection that an anonymous writing is not within the terms of the act of 1880, because it does not "purport" to be the writing of the party, must be specifically taken. A mere general objection, made after receiving the standards and making the comparison, that the disputed writing is incompetent and improper, does not make it error to receive the disputed writing.

Indictment for arson. Upon the trial the People called a number of expert witnesses who testified that an anonymous letter, addressed to Mrs. Rehm, which contained threats to burn her house and barn and the property of one Moody, and an anonymous letter, addressed to Moody, containing like threats, were in the handwriting of the defendant; their opinions were formed from comparing the letters with a number of specimens of his genuine handwriting.

The anonymous letters were received in evidence, against a mere general objection that they were incompetent, and improper as evidence.

Upon cross-examination of these witnesses, the defendant's counsel produced nine different specimens of writing, and asked each witness to compare them with the letters and the specimens put in evidence by the People, and to say whether in his opinion they were in the same handwriting. Some of the experts testified that they thought they were all in the handwriting of the

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defendant, and others thought that some of them were written by the defendant and that the others were not.

Thereupon, John Murphy, a brother of defendant was called as a witness, and asked by defendant's counsel: "Look at these several pieces of paper and state whether or not you wrote any of them, and pick out the ones you wrote?"

Objected to by the district attorney as incompetent, improper and immaterial. Objection sustained, and exception taken.

Defendant's counsel offered to show by the witness that he (the accused's brother) wrote all nine specimens which had been shown to the expert witnesses. Excluded on the same ground. Exception taken.

The Court of Sessions convicted defendant.

The Supreme Court at General Term affirmed the judgment, LEWIS, J., saying: The opinions of the People's witnesses were not based upon an examination of the writings produced by the defendant. They had not seen them when they gave their testimony. So that, as far as their evidence was concerned, it was immaterial who wrote the nine papers produced by the defendant.

If the evidence had been admitted it would have been collateral to the material question, to wit, the authorship of the letters. The defendant was therefore, concluded by the answer of the People's witnesses. *Van Wyck v. McIntosh*, 14 N. Y., 439; *Hilsley v. Palmer*, 32 Hun, 472.

The Court of Appeals affirmed the judgment.

MAYNARD, J. [*after stating facts*]: It is now objected that this mode of proof of defendant's handwriting was unauthorized; that it was not a case of a disputed writing within the provisions of the act of 1880; that the statute was only intended to change the rules of evidence formerly in force when the authenticity of the paper is directly the subject-matter of the issue to be tried, as in the case of the denial of the execution of a note, or a deed, or a will, or any other instrument relied upon as the foundation of an action or defense.

It is insisted that all of the reported cases are of this character, and the language of Chief Judge ROGER, in *Peck v. Callaghan* (95 N. Y., 75), is quoted, where it is said: "The disputed writing

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referred to in the statute relates only to the instrument which is the subject of controversy in the action, and the specimens of handwriting admissible thereunder are those of the person purporting to have executed the instrument in controversy."

Whatever intrinsic merit there may be in this contention, we do not think it is available to the defendant upon this appeal. No such objection appears in the record. The genuine specimens were received in evidence, and the expert witnesses called and permitted to make the comparison and give their opinion upon the subject without any intimation from the defendant that such proof was inadmissible. The defendant himself even called two expert witnesses, and had the benefit of an opinion from them, after a comparison of the letters with the genuine specimens, to the effect that at least one of the letters was not written by the same person as the concededly genuine exhibits. When the letters were offered in evidence there was no objection to their reception on the ground that the proof of their genuineness was insufficient, but they were objected to solely on the ground that the letters themselves were incompetent and improper as evidence; an objection which pertains to the subject matter of the proof offered and not to the method of its presentation, or to any of the preliminary steps to be observed in its introduction. If the defendant had seasonably objected to the evidence of comparison of handwriting, and the objection had been sustained, the prosecution might have been able to have furnished sufficient common law proof of the genuineness of the letters to have authorized their admission as evidence, for one of the expert witnesses was a bank officer who had seen the defendant write, and who might have testified, from his personal knowledge of the defendant's handwriting, that, in his opinion, he wrote the letters in question, and other like testimony might have been produced.

The evidence objected to was not, in its essential nature incompetent, and therefore, all grounds of objection which might have been obviated if they had been specifically stated must be deemed to have been waived (*Turner v. City of Newburgh*, 109 N. Y., 301; *Bergmann v. Jones*, 94 *id.*, 51).

Upon the cross-examination of the expert witnesses for the

prosecution, the defendant, for the purpose of testing the accuracy of their judgment, submitted to them nine different specimens of handwriting, and each was asked to compare them with the letters and the specimens put in evidence by the people, and to say whether in his opinion they were in the same hand, writing. Each gave a different answer, and, with two exceptions, each testified that some of the specimens were written by the same person who wrote the letters and the other specimens; but no two witnesses agreed as to the particular specimens which were so written. The defendant then offered to prove that these nine specimens were not in the handwriting of the defendant, but were written by his brother, and the evidence was excluded. We can discover no error in this ruling. It was a collateral matter properly used for the purposes of a cross-examination, and the defendant was bound by the replies of the witness to the questions put.

It served as an impressive warning to the jury to closely scrutinize the expert evidence, because of the want of concurrence of judgment on the part of the witnesses when they were required to compare the letters with specimens of whose authorship they were ignorant; and, to that extent, the cross-examination was valuable and proper, although it must rest somewhat in the sound discretion of the trial court to determine how far it shall be carried.

But the defendant could not be permitted to go farther and to litigate the immaterial issue of the authenticity of the additional specimens submitted by him for such a purpose (*Hilsley v. Palmer*, 32 Hun, 472).

It would give rise to a multiplicity of collateral issues which might render the litigation interminable, for the people would have the right to disprove, if they could, the testimony offered, and by a comparison of handwriting show that these specimens were not written by the defendant's brother.

The case of the *First National Bank of Hornellsville v. Hyland* (53 Hun, 108, affirmed by this court, 125 N. Y., 711) is not applicable here. The inquiry upon cross-examination was there limited to the genuineness of other signatures, which were already in evidence.

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Nor does the case of the *Mutual Life Ins. Co. v. Suiter* (131 N. Y., 557) aid the defendant. It was there held that a party was not necessarily limited to the genuine signatures, introduced by his adversary for the purpose of comparison, but should be permitted to put in evidence other genuine signatures in order to afford as wide a range for comparison as might be practicable.

But the handwriting offered here was not that of the defendant, but of a stranger to the controversy, and the object of its proposed introduction was not for the purpose of comparison under the act of 1880, but to affect the degree of credit to be given to the testimony of the expert witnesses.

NOTE.—In *Van Wyck v. McIntosh*, 14 N. Y., 439, the court (T. A. JOHNSON, J.) said: The questions arising upon the cross-examination of the defendant's witnesses, respecting the genuineness of the handwriting indorsed upon the two notes exhibited by the plaintiffs' counsel, and the proof of the handwriting thus indorsed, have little, if any, relation to the question of comparison of handwritings by witnesses or by a jury. The plaintiffs' counsel did not propose or offer to submit them to the jury to inspect. His object plainly was, in case they should testify, as they did, that the handwriting on these notes was not genuine, to contradict them by other evidence and show that it was genuine, and then ask the jury to infer that they were mistaken, or had misjudged in respect to the handwriting in issue, because he had proved they were mistaken in respect to that not in issue. This was precisely what was allowed. It was in the nature of impeaching evidence, not direct, but indirect and argumentative. The fact, even if established, that the defendant indorsed the two notes thus exhibited, had no direct bearing upon the credibility of the defendant's witnesses, and only affected their credit incidentally and remotely. Facts bearing directly upon the credibility of witnesses are material to the issue, and witnesses may be cross-examined in regard to such facts, and may be contradicted, if they deny the truth, by other evidence. (*Newton v. Harris*, 6 N. Y., 345.) Hostile feelings on the part of the witness towards the party he is called to testify against, and interest in the action or question in litigation, belong to this class.

But the evidence as to the handwriting on the two notes was wholly collateral, and in no respect material to the issue. In *Griffits v. Ivery* (11 Adolph. & Ellis., 322) it was held that signatures, other than the one in issue, could not be shown to witnesses on cross-examination for the purpose of testing their knowledge of the defendant's handwriting by their agreement or disagreement. And in *Hughes v. Rogers' Executors* (8 Mees. & Wells, 123), where the witness had been examined in regard to the signature of an attesting witness to a paper not in evidence in the action, and had testified it was not the signature of such attesting witness, it was held that the plaintiff could not, by other witnesses, prove that such

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paper was signed by other attesting witness in their presence, as it tended to raise a collateral issue. The practice allowed upon the trial has, doubtless, prevailed quite extensively at the circuit, but it is obviously subject to very grave objections, and ought not to be sanctioned. The real issue was made to depend, in no inconsiderable degree, upon the collateral issue made upon the signature to other papers in no way connected with the action. The jury were, in effect, instructed that they might discredit the testimony of the defendant's witnesses, if they were perfectly convinced that the defendant had admitted the signatures endorsed upon the two notes to be genuine. It is a familiar rule of evidence that a party cannot examine witnesses upon collateral subjects, for the purpose of showing afterwards that they are mistaken. And if he does examine them on such subjects, he cannot contradict their testimony, by other witnesses, for the purpose of discrediting it. I am of opinion, therefore, that the ruling allowing the cross-examination in regard to the two notes, and also that permitting the testimony given on such cross-examination to be contradicted, and the signatures to be proved, was erroneous; and that the judgment of the Supreme Court should be reversed and a new trial granted, with costs to abide the event.

A. S. JOHNSON, J.: A witness on the part of the defense, who had become acquainted with the handwriting of the defendant by seeing him write, testified that the signature to the indorsement in suit was not that of the defendant. Upon cross-examination he was shown certain signatures, likewise purporting to be the defendant's, upon papers not relevant to nor in evidence in the cause, and was asked under objection whether they were the signatures of the defendant. He answered that they were not. The plaintiffs afterwards, under objection, gave evidence legally tending to show that the genuineness of these latter signatures had been admitted by the defendant.

The first inquiry was put with one of two views, suited to the two answers which the witness might give. In case he affirmed the genuineness, to contend to the jury that these and the indorsement in question were in the same handwriting, or, if he denied their genuineness, to contradict him upon that point by other witnesses. The first of these questions was presented to the King's Bench in *Doe v. Newton* (5 Adolph. & Ellis., 514), and it was decided, all the judges agreeing, that the jury could not institute a comparison between the signature in question and other signatures unless these last were relevant evidence in the cause. The decision was put upon the grounds that the issue, as to the genuineness of the documents produced for the purpose of comparison, was collateral and irrelevant, and that there was great danger of unfair selection of specimens of handwriting. *Griffits v. Ivery* (11 Adolph. & Ellis., 322) and *Hughes v. Rogers* (8 Mees. & Wells, 123) cover whatever remained undecided of the questions here presented, after the decision in *Doe v. Newton*. In the first of those cases, the question being upon the genuineness of the defendant's signature, and witnesses being called for him, and deposing that the signature in question was not his, the plaintiff proposed to ask

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each witness as to another paper, not in evidence for any other purpose, whether it was signed by the defendant, to the end that their agreement or disagreement might be considered by the jury in measuring the witness' knowledge of the handwriting of the party. The evidence was rejected. On refusing a rule for a new trial, Coleridge, J., said: "We must not allow papers which are not evidence in the cause to be let in for any purpose whatever. It is said that this was offered merely for the purpose of trying the knowledge of the witnesses; but the inquiry would not stop there. It would be impossible to keep from the jury questions whether this or that paper was or was not in fact written by the party." Lord Denman, C. J., said: It would be ludicrous to suppose that a paper may be used for the purpose suggested, and that a jury must then be told that they cannot look at it to see how far its appearance supports the evidence of the witnesses. But if they did look at it, all the unlimited multiplicity of questions would come before them, which we meant to shut out by our ruling in *Doe v. Newton*.

In *Hughes v. Rogers* (*supra*), which was an action upon a bond, the plaintiff called a witness to prove the signature of an attesting witness who was dead. The witness stated that the signature was not in the handwriting of the deceased attesting witness. He was then shown another paper, not in evidence in the cause, and, being asked, denied that it was the handwriting of the attesting witness. It was then proposed to prove, by witnesses, that this second paper had been signed by the attesting witness in their presence. The evidence was excluded, and the ruling was afterwards held *in banc* to be correct, upon the principle that to have received it would have raised a collateral issue.

These cases are, it is true, not of a binding authority in this court; but the principle which they apply, of confining the trial to the issues in the cause, is sound and familiar. It was applied to a question belonging to this subject, in *Jackson v. Phillips* (9 Cow., 94), where the plaintiff, who disputed the genuineness of the signature of a deed, called a witness who had seen the party write, and who stated the signature in question to be not genuine, and offered to prove by him another writing to be genuine, in order to submit it with the deed to the jury. It was rejected, and the ruling was afterwards approved, both upon the ground of danger of unfairness in the selection of specimens, and of the inconvenient length to which such collateral inquiries would run. Undoubtedly, a witness who speaks to handwriting affirms that he knows the handwriting of the party, and that the particular writing is or is not his. Each branch of his testimony is material, and the one as material as the other. He may be contradicted as to his knowledge; may be cross-examined as to how he acquired it, and may be contradicted in all the particulars on which his pretended knowledge is founded. If he bases his knowledge on having seen the party write, it might be shown that it was some other person, and not the party whom he saw write; or if his knowledge was professedly founded upon correspondence with the party, this might be proved to be erroneous or untrue. His knowledge may, unquestionably, be

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experimented upon, but a fact irrelevant to the issue cannot be introduced in the cause, and tried for the sake of so experimenting in regard to it. The credit of a witness is always in issue; yet nothing is clearer law than if a witness is asked as to an irrelevant fact, and answers, he cannot be contradicted in respect to it. So, even in the case of an expert, called upon a trial where the issue was whether two machines were identical in principle, it was held that he could not, on cross-examination, be examined as to another machine, and be called upon to point out how far it differed in principle from those first alluded to, though the purpose was stated to be to show by his answers and by other testimony the incorrectness of the witness in his previous examination and in his knowledge of mechanics. Judge STORY held the inquiries irrelevant, and that, if answered, they would not authorize the contradiction of the witnesses. (*Odiome v. Winkley*, 2 Gallison, 53.)

Whether the two notes were or were not genuine was immaterial. A written admission of their genuineness by the party would have had no bearing upon the question of the genuineness of the note in suit. Nor would it furnish even moral evidence upon the subject. The fact is brought into the cause solely because the witness has spoken about them in his testimony, and by that means only does the inquiry as to their genuineness assume any significance. Now a witness' credit may be attacked, by showing a want of knowledge or a perverse use of his knowledge; one is as material as the other, and the inquiry must be confined within the same legal bounds in each case. Suppose the plaintiff's theory was that the witness denied the signature in suit to be the defendant's, perversely and wickedly, could it be pretended that he could be interrogated as to the other signatures, and contradicted if he also denied them? The argument in favor of that course might be just that which is presented in this case, that as to those signatures the plaintiff is prepared with conclusive evidence to contradict him. The legal answer to both propositions is, that the inquiry was not relevant to the issue on trial, and that it involved the trial of a new issue, which again might give rise to other new issues without end.

It is quite true that the proof of handwriting by witnesses, who have not seen the very paper written, is among the most unsatisfactory parts of evidence, resting, as it always does, upon presumptions of greater or less infirmity. It is possible that some mode of comparison of the disputed writing with genuine specimens, fairly selected, might result in more accurate determination; but until the Legislature shall introduce it, properly guarded as to the fairness and genuineness of the specimens to be employed, it cannot be introduced into the common law of this State.

The French code excludes, as standards of comparison, private writing not admitted to be genuine in the cause (*Doe v. Suckermom*, 5 Adolph. & Ellis., 703), while we could frame no limit to the kind of evidence by which the writings, to serve as standards, should be proved. If the courts admit them at all, and in any case, they are of right provable by no other rules than those which apply to writings generally, and thus the genuine-

 Note on Examination as to Writings not in issue.

ness of the standards would, except in accidental cases, be just as uncertain as that of the writings whose genuineness they were introduced to test. Under such a state of things, I think the rule a wise one which excludes the inquiries as remote and irrelevant.

The judgment should be reversed and a new trial ordered.

All the judges concurred in the foregoing opinions.

In *Brown v. Hall*, 85 Va., 146; s. c. 7 Southeast. Rep., 182, upon an issue of *devisavit vel non* as to an *Holographic* will, it was held error not to allow one who was acquainted with the handwriting of the propounder to testify as to whether the will was in his handwriting in order to show that it was not in the handwriting of testatrix.

NOTES OF RECENT CASES AS TO EXAMINING WITNESS AS TO OTHER WRITINGS.

Georgia : *Travelers Ins. Co. v. Sheppard*, 85 Ga., 751; s. c., 12 Southeast. Rep., 18 (to test the skill of an expert as to handwriting on cross-examination, writings or parts of writings no matter by whom written, may be exhibited to him for comparison with the handwriting in question; and neither the witness nor the opposing counsel is entitled to know what writings will be used for such purpose, or whether genuine or not). *Kentucky* : *Andrews v. Hayden*, 88 Ky., 455; s. c., 11 Southwest. Rep., 428 (where a non-expert witness who is acquainted with a person's handwriting testifies as to his signature, it is not proper on cross-examination to show the witness a number of spurious signatures prepared for the purpose, and to ask him to select the genuine signature). *Michigan* : *Johnston Harvester Co. v. Miller*, 72 Mich., 265; s. c. 40 Northwest. Rep., 429 (it is not error upon the cross-examination of handwriting experts, who have no knowledge of the handwriting of the person whose signature is disputed, to examine them as to whether the signatures of another person to documents already in evidence were actually written by the same person). *Missouri* : *Rose v. First National Bank*, 91 Mo., 399; s. c. 3, Southwest. Rep., 876 (a bank cashier, who testified as to the genuineness of the signature to a check disputed by plaintiff, was shown the signatures of plaintiff's name to two blank checks and was asked in whose handwriting they were. The witness replied that he would pay them as plaintiff's checks. The plaintiff was then allowed to introduce such signatures in rebuttal, and show that they were written by third persons during the progress of the trial. *Held*, that this was error). *New York* : *First National Bank v. Hyland*, 53 Hun, 108; s. c. 25 State Rep., 446; 6 N. Y., Supp., 87 (the judgment of an expert as to handwriting may properly be tested by inquiries as to his opinion in regard to the genuineness of signatures to other notes and endorsements which are in evidence).

NOTE ON PREAPPOINTED WITNESSES.

[See on this subject: *Maine Miss. Soc. v. Ingalls*, Ill., 1893, 35 Northeast. Rep. 743; *Carleton v. Carleton*, 40 N. H., 14, s. c. *Thayer's Cas. on Ev.* 772-816.]

At common law if an instrument was attested by a subscribing witness that witness must be produced or accounted for before any other proof of execution could be given, and, if accounted for, his handwriting must be proved.

See the rule fully stated in the opinion of Justice Nelson, in *Pelletreau v. Jackson*, 11 Wend., 110, and of Senator Tracy, on affirmance *sub nom.*, *Jackson v. Waldron*, 13 Wend., 178, at p. 196.

By statute in New York (N. Y. L. 1883, p. 200, c. 195) and in some other states, a subscribing witness is not necessary unless a subscribing witness is necessary to the validity of the instrument. For a list of such instruments see 1 *Univ. L. Rev.*, p. 36. Such instruments are now usually acknowledged, or proved by the subscribing witness before a notary or other officer (which may be done after suit brought, unless the acknowledgment or proof was essential to validity, *Holbrook v. N. J. Zinc Co.*, 57 N. Y., 616) instead of producing him at the trial.

Acknowledgment of a deed dispenses with the necessity of calling a subscribing witness. *Simmons v. Havens*, 101 N. Y., 427.

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RUGG v. RUGG.

New York Court of Appeals, 1881.

[Reported in 83 N. Y., 593; affirming 21 Hun, 383.]

One named in the will as executor is not thereby rendered incompetent to testify as a witness on the probate of the will.

The due execution of a will may be established even in opposition to the testimony of the subscribing witnesses.

The subscription by the testator must be shown to have been made prior to that of the subscribing witnesses.

Failure of recollection by the subscribing witnesses cannot defeat probate if the attestation clause and the surrounding circumstances satisfactorily prove execution of the will.

Appeal from the decree of a surrogate in probate proceedings.

The Supreme Court at General Term affirmed the decree.

HARDIN, J., said: *Jackson v. Jackson* (39 N. Y., 153) is an authority for holding that the witnesses who are to attest the subscription and publication of a will by a testator should sign the same *after* the subscription by the testator. The declaration of the testator may be that it is his last will, on the same occasion of the signing and witnessing, and it is not essential that it immediately precede the subscription.

We are called upon to review the evidence and from it determine whether there was a due execution of the will shown by it. Both of the subscribing witnesses were called, and gave evidence touching the circumstances of the execution of the will; and Jenks, who was named as one of the executors, was also called as a witness in behalf of the proponents, and gave evidence of the facts and circumstances attending the execution of the will. His testimony was objected to by the contestants. But the authorities require us to hold that he was a competent witness, and that his testimony was properly received by the surrogate. (*McDonough v. Loughlin*, 20 Barb., 239; *Children's Aid Society v. Loveridge*, 70 N. Y., 387; *Pruyn v. Brinkerhoff*, 7 Abb. Pr., N. S., 401.)

We must, in considering the question raised in respect to the

due execution of the will, give effect and force to the evidence given by Jenks. He was a man about sixty years of age, had been accustomed to draw wills, and supervise their execution, and the evidence given by him is to the effect that the essentials to a due execution were all observed, and he is emphatic in his statements that the testator subscribed his name before the subscribing witnesses. It is settled beyond doubt or discussion, that the due execution of a will may be established by other evidence than such as may be derived from the subscribing witnesses. Indeed, in opposition to the evidence of subscribing witnesses, wills have been established and admitted to probate. (*Trustees of Auburn Seminary v. Calhoun*, 25 N. Y., 425; and *op. of DENIO, J., in Tarrant v. Ware*, quoted in a note to the last case; *Jauncey v. Thorn*, 2 Barb. Ch., 40).

But it is said that one of the subscribing witnesses in the case before us stated that the testator did not sign until after the witnesses had subscribed their names. During the course of his examination he became somewhat in doubt as to the order of the signing, and he stated, viz: "I thought first it was after, and it seems as if it was. I may be mistaken." The other witness, in the course of his examination stated, viz.: "I am not positive who signed first; think Mr. Hooker did. Mr. Hooker first signed it, Mr. Jenks showing him where; he rose, I sat down and asked Mr. Jenks where I should sign." Then in answer to the question, viz.: "Do you recollect that Mr. Rugg had signed this before Mr. Jenks told you where to sign?" he said, "I do not recollect." * * * He is further asked, viz.: Ques. "Is it not your best recollection, that immediately after you signed, Mr. Jenks picked up the paper, folded it, and you and Mr. Hooker immediately passed out," and the witness answered: "I think it was." Ques. "Before that you had seen Mr. Rugg sign?" Ans. "Yes, sir, after the time it was folded Hooker and I passed out." He subsequently stated, "I do not remember that Rugg signed after us; I saw him sign."

Thus we see that the two witnesses are not clear and positive in relating the order in which the events, stated by Jenks in his evidence, took place. But we think their evidence, taken with his, gives rise to a very strong presumption, that, after the testa-

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tor had signed his name, the two witnesses became subscribing witnesses, by placing their names below the attestation clause. In *Gwilliam v. Gwilliam* (3 Swabey & T., 200), it was held that the court is at liberty to judge from the circumstances of the case, whether it was probable that the testator's name was on the will or not, at the time of the attestation; and, being of the opinion that it was, to pronounce for the will and its due execution. That was a case where two old ladies were the subscribing witnesses, and they testified they did not remember the testator's name being on at the time they became subscribing witnesses. SIR C. CRESSWELL upheld the proofs and admitted the will to probate. The same principle is asserted in the *Matter of John Kellum's Will* (52 N. Y., 517). CHURCH, Ch. J., says: "The principle is that a mere failure of memory on the part of the witnesses shall not defeat a will, *if the attestation clause* and other circumstances are satisfactory to prove its execution.

We have read all the evidence touching the execution of the will before us, and we cannot resist the conclusion that the testator's name was written by him to the will before the subscribing witnesses signed their names in his presence and in the presence of each other, and the testator declared the instrument to be his last will and testament. Some questions were quite leading, but as the witnesses were not clear in recalling the events attending the execution of the will, we cannot say that the surrogate abused his discretion in allowing them, and therefore we must decline to interfere with the rulings made upon the hearing.

The Court of Appeals affirmed the judgment.

MILLER, J. We think that the evidence was sufficient to establish that the will was executed in accordance with the provisions of the Revised Statutes and the decisions of this court. The evidence of the subscribing witnesses upon the cross-examination, which, it is claimed, tended to show that they did not sign the will after it was signed by the testator, is insufficient to establish that it was not properly executed. Hooker, one of them, after stating that the testator signed after he did, appears

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to have had doubt on the subject, and testifies that he may be mistaken. The other witness, Smallwood, who testifies that he does not remember that Rugg signed last, states, in the course of his examination, that he (the witness) was the last one who signed. It will be seen that the testimony is by no means satisfactory that Rugg signed last, and the most which can be claimed from the evidence of the subscribing witnesses is that they were not positive—that they did not remember exactly how the fact was. To supply this want of memory, Jenks, the executor, who had considerable experience in such matters, testifies distinctly as to all which took place, the order in which the several acts were done, and that the testator signed before the subscribing witnesses. The preponderance of proof was in favor of the due execution of the will, and, as the evidence stood, the surrogate could not come to any other conclusion than that the will was properly executed. Where there is a failure of recollection by the subscribing witnesses, the probate of the will cannot be defeated if the attestation clause and the surrounding circumstances satisfactorily establish its execution. (*Matter of Kellum*, 52 N. Y., 517.) In fact, wills may be established even in opposition to the evidence of the subscribing witnesses. (*Trustees of Auburn Theo. Sem. v. Calhoun*, 25 N. Y., 425.)

There was no objection to the questions put to the subscribing witnesses in regard to their being mistaken; and within well-settled rules they were properly allowed.

Jenks was also a competent witness. (See *Children's Aid Society v. Loveridge*, 70 N. Y., 387.) There is no distinction between this case and the one cited which authorizes a disregard of the latter authority.

Note on the Rule as to Shop Books.

NOTE ON THE RULE AS TO SHOP BOOKS.

This rule, otherwise known as the rule in *Vosburgh v. Thayer*, 12 Johns, 461; s. c. *Thayer's Cas.*, 523, as developed in practice and established by later cases, results as follows: In actions for goods sold and services rendered, not founded on special contract, the party's books of account are admissible in evidence for the consideration of the jury, in his own favor, upon due preliminary proof: 1. That they are his books of account kept in the regular course of business; 2. That there was a course of dealing between the parties; 3. That some article or service charged was actually furnished; 4. That the party had no clerk or bookkeeper (unless it may be for merely writing up or posting charges originally made and completed in substance by the party); 5. That he kept fair and honest accounts.

In more detail observe: 1. The record must be shown to have been the party's account, kept in the regular course of business. Formal book-keeping is not important. The record derives whatever respect it receives, from the fact that it is the personal record of the party, kept according to his usage and degree of intelligence, for the purpose of preserving the memory of moneys due him for goods or labor. The account is not to be excluded because kept in ledger form, so that the charges against defendant are on a separate page from those against others; although entries scattered through an account in the journal or day-book form are more cogent evidence. But if shown not to be the book of original entries, it is not competent without producing or accounting for those entries. If it appear either from the books themselves, or extrinsic evidence, that they are a part of a system of books involving others which may be necessary to a complete view of the state of accounts, the others must be produced or accounted for. Thus, where the ledger is relied on, a day-book shown to have been kept must be produced. The charge should be made under an existing right to charge, not merely in anticipation of such a right, and must appear to have been made for the purpose of charging, for specific things, the person upon whose credit the transaction was had, as distinguished from memoranda of orders, or deliveries, or of things to be subsequently done.

2. There must have been some course of dealing between the parties. A single sale, though of more than one article, is not enough to constitute that relation between the parties which allows the books to be admitted.

3. Independent evidence that some article or service charged was furnished, is indispensable. Proof of this prior to the time covered by the account is insufficient. One article delivered and one item of work done, as charged, satisfy this requirement.

4. The rule we are now considering does not apply to admit the books of a party to the suit, if they were kept by a regular clerk or bookkeeper, whose business it was to notice sales and enter them in the books; such entries are admissible under other rules already stated. But the books of daily entries, made by the party himself, are not rendered

Note on the Rule as to Shop Books.

incompetent by the fact that his servant, porter or messenger noted in temporary form the deliveries made by him, and reported them to the party, who, upon such information, or copying from the temporary memoranda, made the entries in question. If there were partners, it is enough to produce the one who kept the book; but if he is dead, the book may be admitted on the oath of the other, if he can testify to his knowledge of the correctness of the entries.

5. To show that the party kept fair and honest books, the testimony of one witness is enough, who has dealt with the party, and settled with him by his account; but he should be a customer, or a witness to settlement by customers, or may be even an employee. A settlement by the ledger is enough, though the witness did not see the day-books. The evidence of fair and honest accounts should be directed, in part at least, to the period covered by the dealings in question.

The competency of an account under these rules is a preliminary question for the court.

An account offered in evidence under these rules should be submitted to the judge for inspection. But if the books are shown to have been lost or destroyed, secondary evidence of their contents may be received. Without laying a foundation for secondary evidence, a copy is not admissible. Abbreviations and symbols may be explained by parol, by testimony other than that of the party himself. The party may explain by stating his usage, not by stating a secret intent. The fact that the book has been mutilated in a part not appearing to be material to the issue, such as having leaves torn out, etc., does not make it incompetent, but goes to its credit. But apparent alterations or erasures in a part material to the cause must be explained before the account can be admitted. Any fact showing the books unworthy of credit may be proved, such as bad method of bookkeeping; or bad business character of the party; or erasures, mutilations, etc.; but not the general bad moral character of the party.

An account properly in evidence under this rule is competent evidence of the facts of sale, of the dates, of the price or value, and of the delivery; but not evidence of any other matter than the issue of debit and credit between the parties.

Pass books, kept by one party and written up by the other, are competent, irrespective of whether the entries were original memoranda, or copies.

Abb. Tr. Ev., 323, &c., as modified by cases below given.

NOTE. — In *Davis v. Seaman*, 64 Hun, 572, it was held that, (1) as against the executor or administrator of a deceased person, the books of account of one who rendered services, etc., to the deceased, cannot (under N. Y. Code Civ. Pro., §829) be proved by oath of the claimant. (2) The testimony of a customer that he settled the bill presented, because the bill was for a specific amount agreed upon before the services were rendered, is not sufficient to prove "settlement according to the book," under the rule in *Vosburgh v. Thayer*, although he may have seen the making of the entry in the book.

McGoldrick v. Traphagen, 88 N. Y., 334.

McGOLDRICK v. TRAPHAGEN.

New York Court of Appeals, 1882.

[Reported in 88 N. Y., 334.]

The employment of a bookkeeper who had nothing to do with the transactions, but only with transferring entries and posting books, is not the keeping of a "clerk," within the rule in *Vosburgh v. Thayer*.*

An employee of the party is competent to give the necessary testimony of someone who has settled his accounts with the employer by the employer's books and found that he kept honest and correct books.

Arthur McGoldrick, a blacksmith and shoer of horses, presented to W. C. Traphagen, executor of one Wilson, who had in his lifetime been a livery stable keeper, a claim for $7,337\frac{36}{100}$ dollars for services in horseshoeing: the executor disputed the justice of the claim; it was thereupon, by agreement, referred pursuant to the statute (2 N. Y. R. S., 88, 4 *id.*, 8 ed., 2,560-§36).

The deceased had carried on two large livery stables, and the claimant's account contained items running from 1868 to 1875.

At the trial before the referee, it appeared by the testimony of the claimant and of one Birmingham and one Pryor, that the usage of plaintiff's business was, his men shod the horses under his direction; he kept an account, but seldom made the entries in the book himself; he usually entered on the slate the work he saw done, at the time, or in the afternoon, or at night of the same day: in his absence the foreman made the slate entries. The entries from the slate were then transferred by the claimant or by Birmingham, who kept the claimant's books, into the day-book about every day; and every two or three days, or once a week, Birmingham posted them into the ledger, and when the entries of work had been made in the ledger the claimant fixed the prices.

Similar usage during a later period than Birmingham's, was proved by one Pryor, who transferred charges in the same way, and also made some entries on the slate.

When the bookkeeper made entries on the slate he did so from reports made to him by the men or the foreman.

* See note at the end of this case.

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There was direct testimony to plaintiff's rendering of constant services to the decedent in shoeing during the period in question.

Several other customers of the claimant were called as witnesses, and each produced the claimant's bills against himself, and testified to having found his bills honest and fair (and correct, except for some clerical errors), and to having paid his bills; but neither of them had seen his books. The claimant's bookkeeper, however, was called, and on being shown the bills of these customers, testified that he made them out from the books, from which they were correctly copied.

He also testified that he, the bookkeeper, settled his own accounts with the claimant by the claimant's books, and to the best of his knowledge and belief, the claimant kept honest books.

On the first trial the referee refused to receive the books on the ground that the proper suppletory evidence had not been given; and he therefore reported against the plaintiff.

The Supreme Court at General Term reversed the judgment.

INGALLS, J., said: We discover nothing in the case which should create suspicion in regard to the honesty or accuracy with which the accounts were kept; we are convinced that the books of accounts should have been received as evidence by the referee, and considered by him in connection with the other testimony in the case.

One pre-requisite was wanting to constitute them sufficient evidence to establish the account. Independent of the other proofs, viz., the failure by McGoldrick to show that other persons had had dealings with him and settled their accounts from the books and found them correct, they were, nevertheless, competent evidence as original entries or memoranda, having been made at or about the time the work was performed, and by the parties who did the work, and by whom the accuracy of such entries upon the books is satisfactorily established. It was the province of the referee to determine the value of the books as evidence when once received; but he rejected them absolutely, whereby, in our judgment, error was committed prejudicial to the case of McGoldrick. The courts of this state by their

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decisions have extended the doctrine very far in favor of the reception of this class of evidence, and sufficiently so to have justified the admission of the books of account as evidence in conjunction with the other proofs in the case (*Krom v. Levy*, 1 Hun, 171; *Filkins v. Baker*, 6 Lans., 546; *Merrill v. Oswego R. R.*, 16 Wend., 599; *Gray v. Mead*, 22 N. Y., 462; *Marcay v. Schults*, 29 N. Y., 346, 351).

On the second trial before another referee the books were received, and judgment was given for plaintiff.

The General Term affirmed the judgment without further opinion.

The Court of Appeals now affirmed the judgment.

Charles Matthews, for defendant appellant, insisted that the books should have been excluded because on the grounds among others that (1) there was no proof that any particular service charged was actually rendered; (2) the claimant kept a book-keeper; (3) the ledger could not be deemed a book of original entries; (4) the customers produced had never seen plaintiff's books; and the bookkeeper being an employee was not a customer within the rule.

J. M. Martin, for respondent, cited besides the cases in the opinion, *Stroud v. Tilton*, 4 Abb. Ct. App. Dec., 324; *Davidson v. Powell*, 16 How. P., 467; *Breinig v. Matzler*, 23 Penn., 156; *Ewart v. Merrill*, 5 Haw. (Del.), 126; *Bailey v. Barnelly*, 23 Geo., 528; *Karr v. Stephens*, 24 Iowa, 123; *Hill v. Scott*, 12 Penn., 168; *Wollenweber v. Kitterlinus*, 17 Penn., 389; *Pendleton v. Weed*, 3 E. D. Smith, 72.

MILLER, J. We think that there was no error committed by the admission of the ledger of the respondent as evidence. It was proved upon the trial that the work done by the respondent for the testator was first entered at the time upon a slate, generally by the respondent. The entries werethen transferred by the book-keeper to a day book about every day, and then to the ledger from the day-book. No prices for the work were entered until the charges were carried out into the ledger, and then the respondent fixed the prices and they were entered accordingly.

The respondent testified that he directed the men in shoeing the horses and superintended the work generally, and attended in part to the shoeing of the horses himself, and they were shod from the date of the bills to the death of the testator. That he kept the account, entered the work when there, except when occasionally absent, and then the foreman did it, and that the entries were correctly carried from the slate to the day-book, and from the day-book to the ledger. There was evidence that one of the bookkeepers saw some work done and made some entries on the slate, and also testimony from other witnesses showing that the work had been done by the respondent and his workmen; the manner in which the account had been kept and the account showed a credit of \$3,247 for moneys paid by the testator. There was no contradictory testimony as to the correctness of the amount; nor were any witnesses sworn for the defendant to contradict the evidence given as to the nature of the services rendered or to prove that they were not rendered. It also appeared that the respondent kept no clerk who had anything to do with his accounts or his business generally, but that he had a bookkeeper who transferred the same as already stated. The accounts of the respondent were really kept by himself or under his immediate direction, with the assistance of a bookkeeper to transfer the original entries made from the slate to the day-book and from the day-book to the ledger. This was done under his superintendence, and by his direction expressly the prices were carried out. Until then the entries were imperfect and incomplete, and neither of the books contained all which was required to make complete entries showing the work done and the amount of the charges made for the same. There was no entry of the entire charge prior to the price being carried out. As it stood then the ledger contained but imperfect entries of the items with no prices, and when these prices were entered they were original entries of such prices. Neither the slate, the day-book nor the ledger was perfect of itself. As a book of original entries all of them may be taken together; the ledger equally with the day-book may be regarded, we think, as a book of original entries. Without it there was no charge actually made in full, showing any service rendered and the amount claimed. With it the charges made are complete, and

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the ledger contained the first original entry of them as an entirety. It was then competent evidence as a book of original entries, unless there was a failure to comply with some other requirements of the law as to the admissibility of books of account as evidence.

It claimed that there was no proof that the respondent keeps honest and correct books. Several witnesses testified that they had settled their accounts with the respondent and found them honest and correct, but had never seen the books.

The bills settled, which were proved to have been copied from the books, were introduced in evidence and the respondent's bookkeepers testified that they were copied correctly from the books. One of them also swore that he had settled his own account with the respondent by his books, and to the best of his knowledge he kept honest books and that he never heard anything to the contrary. Although the evidence of those who had settled from copies from the books which were produced does not strictly comply with the rule stated as to this portion of the proof, the evidence of the bookkeeper who settled his accounts by the books supplied this defect, and he testified to all that was required within the authorities. The rule in regard to this subject is that the party shall prove by those who have dealt and settled with him that he keeps fair and honest accounts. (*Vosburgh v. Thayer*, 12 Johns., 461.) * * *

We do not discover any reason why a bookkeeper who has an account with his employer is not a competent witness within the rule stated. He deals with the employer, has an account which he has settled from the books, and ought to be able to state whether the accounts were honestly and fairly kept. The rule is a general one and no reason exists why it should be restricted in its operation so as to exclude any one who deals with the party. In *Hauptman v. Catlin* (1 E. D. S. [N. Y. C. P.], 729), it is laid down in the opinion of one of the judges that the correctness of the books cannot be proved by persons in the employ of the party. In this case one judge dissented, another judge did not concur in this view, and the case was disposed of upon other grounds. No authority is cited which sustains the rule laid down in the opinion referred to, and I am unable to perceive any prin-

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ciple upon which it can be upheld. The points of the appellant's counsel do not distinctly claim that either of the respondent's bookkeepers who had charge of the books alone was a clerk within the meaning of that term, and within the rule applicable to this species of evidence. Be that as it may, however, we think that the clerk intended was one who had something to do with and had knowledge generally of the business of his employer in reference to goods sold or work done, so that he could testify on that subject. It evidently means an employee whose duty it is to attend to the details of business, and thus is able to prove an account, and not one who from his isolated position as a bookkeeper can have but little means of knowledge personally as to the transactions done or information relating thereto, except what is mainly derived from others. The latter position was that occupied by the bookkeepers of the respondent, and they were in no sense clerks within the meaning of the law as to evidence of this character. The authorities are numerous which hold that books containing entries made by those whose duty it was to make them in the usual course of business are competent evidence when other requisites are sufficiently established. (*Bank of Monroe v. Culver*, 2 Hill, 531; *Merrill v. Ithaca and O. R. R. Co.*, 16 Wend., 586; *Krom v. Levy*, 1 Hun, 171, s. c. 3 Supm. Ct. (T. & C.) 704.) The ledger of the respondent was clearly admissible within the rule as to the admission of books of account as evidence. That they were transferred from a slate does not affect their admission as testimony. (*Sickles v. Mather*, 20 Wend., 72; *Faxon v. Hollis*, 13 Mass., 427.)

While the large account of the respondent should induce caution and close scrutiny, the evidence should not be excluded when it is apparent that no rule of law has been violated. It may be observed that there is considerable evidence in this case to show that the demand of the respondent is honest and just, independent of the books.

The questions raised as to the admission of other evidence are without merit and do not require examination.

All the judges concurred except FINCH and TRACY, JJ., dissenting, and RAPFALLO, J., absent.

Judgment affirmed.

Smith v. Rentz, 131 N. Y., 169.

SMITH v. RENTZ.

New York Court of Appeals, February, 1892.

[Reported in 131 N. Y. 169, reversing 37 State Rep., 695; s. c. 14 N. Y. Supp., 255.]

The mere inspection by the adverse party of a book or paper produced upon notice does not give the party producing it the right to put it in evidence.

The rule admitting in evidence the books of tradesmen, and other persons engaged in business, in their own favor, is confined to transactions in the ordinary course of buying and selling or rendition of services, and has no application to books or entries relating to cash items or dealings between the parties—*e. g.*, the books of a person who acted as banker and general business agent of another.

Appeal by defendant from the affirmance of a judgment by the General Term of the Supreme Court of the First Department entered upon the report of a referee, appointed at circuit, to hear and determine all the issues.

Eugene Smith as executor of Richard Patrick, deceased, sued Frederika Rentz for moneys advanced and paid out by plaintiff's testator in behalf of defendant as her banker and general business agent.

The *Supreme Court at General Term* held (37 State Rep. 695; s. c., 14 N. Y. Supp. 255), that the books of plaintiff's testator were admissible in his behalf, because on examination of plaintiff before the trial, they had been produced on defendant's notice, and inspected by his attorney; and that they were also admissible, notwithstanding the account related wholly to transactions in money, under the general rule admitting the books of a party keeping no clerk.

Leopold Leo, for appellant.

H. B. Closson, for respondent.

ANDREWS, J. [*After considering at length and ruling on the point stated in the first head note, continued thus*]:

The claim is also made that the books were competent as original evidence of the entries under the rule making books

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of account in certain cases evidence in favor of the party keeping them. We think there is no foundation for this contention.

The rule which prevails in this state (adopted, it is said, from the law of Holland), that the books of a tradesman or other person engaged in business, containing items of accounts, kept in the ordinary course of book accounts, are admissible in favor of the person keeping them against the party against whom the charges are made after certain preliminary facts are shown, has no application to the case of books or entries relating to cash items or dealings between the parties.

This qualification of the rule was recognized in the earliest decisions in this State, and has been maintained by the courts with general uniformity (*Vosburgh v. Thayer*, 12 John., 461). It stands upon clear reason. The rule admitting account books of a party in his own favor in any case was a departure from the ordinary rules of evidence. It was founded upon a supposed necessity, and was intended for cases of small traders who kept no clerks, and was confined to transactions in the ordinary course of buying and selling, or the rendition of services. In these cases some protection against fraudulent entries is afforded in the publicity which, to a greater or less extent, attends the manual transfer of tangible articles of property or the rendition of services, and the knowledge which third persons may have of the transactions to which the entries relate.

But the same necessity does not exist in respect to cash transactions. They are usually evidenced by notes, or writing, or vouchers in the hands of the party paying or advancing the money.

Moreover, entries of cash transactions may be fabricated with much greater safety and with less chance of the fraud being discovered than entries of goods sold and delivered, or of services rendered.

It would be unwise to extend the operation of the rule admitting a party's books in evidence beyond its present limits, as would be the case, we think, if books containing cash dealings were held to be competent.

Parties are now competent witnesses in their own behalf. A

Burton v. Driggs, 20 Wall., 125.

resort to books of account is thereby rendered unnecessary in the majority of cases.

We think the ledger was erroneously admitted in evidence, and the judgment below should, therefore, be reversed and a new trial ordered.

All the judges concurred except MAYNARD, J., taking no part.

BURTON v. DRIGGS.

United States Supreme Court, 1873.

[Reported in 20 Wall., 125.]

When it is necessary to prove the results of voluminous facts or of the examination of many books and papers, and the examination cannot be conveniently made in court, the results either affirmative or negative may be proved by the person who made the examination.*

All the material facts appear in the opinion.

The *jury* found in favor of plaintiff.

The Supreme Court affirmed the judgment.

SWAYNE, J. [*after passing on other points*]: The next assignment of error is the admission in evidence "of such parts of the depositions of A. L. Turner and C. P. Steers as refer to what appeared or did not appear on the books of the Tioga County Bank." It was shown by the plaintiff in this connection that the books in question were in the village of Tioga, Pennsylvania, that the plaintiff had endeavored to obtain them for use on this trial, and that those having the custody of them refused to permit them to go. The testimony of Turner was, in substance, that he was the cashier, that he had examined the books and papers in the bank relating to its affairs from its organization down to July, 1859, and that he found no evidence of any kind that the defendant ever had any connection or transaction with the bank, or any interest in it whatever; and that subsequently at the request of the plaintiff and for the purposes of this suit,

* It is within the discretionary power of the court to refuse to receive such evidence and require the books to be produced, unless the party gives such evidence as to their absence as to set in secondary evidence of contents. See *Von Sachs v. Kretz*, 72 N. Y., 548, affg. 10 Hun, 95.

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he repeated the examination with the same result. Steers testified that he was cashier of the bank from about the 15th of September, 1858, to about the 29th of April, 1859, and that during that time the defendant, Burton, did not furnish to the bank \$7,060.18, or any other sum of money, that his name was never on the books of the bank, nor did the bank owe him anything on any account during that period, and that the witness did not think his name appeared on the books of the bank as a stockholder during that time. The books being out of the State and beyond the jurisdiction of the court, secondary evidence to prove their contents was admissible.

When it is necessary to prove the results of voluminous facts or of the examination of many books and papers, and the examination cannot be conveniently made in court, the results may be proved by the person who made the examination. 1 Greenl. Ev., § 93.

Here the object was to prove, not that the books did, but that they did not show certain things. The results sought to be established were not affirmative, but negative. If such testimony be competent as to the former, *a multo fortiori* must it be so to prove the latter.

NOTE.—In *Lewis v. Palmer*, 28 N. Y., 278, an action for conversion, in which the validity and effect as against defendants, of a chattel mortgage made by W. & W. H. Lewis to plaintiff was in question, one of that firm, examined as a witness, was asked: "What was the state of the accounts between the plaintiff and your firm at the time of the giving of the mortgage?" The answer was: "He was indebted to us about \$160; I ascertain this from our books." The defendants then objected to the evidence without a production of the books.

WRIGHT, J. There was no force in the objection. It was not necessary to produce the books of the firm to qualify the witness to answer the interrogatory.

NOTE.—In *Boston & Worcester R. R. Co. v. Dana*, 1 Gray, 104, BIGELOW, J., said: The defendant further objects that schedules made from the original papers and documents previously proved in the case, showing certain data and results obtained therefrom, and verified by the witness by whom they were prepared, were improperly admitted. But it appears to us, that questions of this sort must necessarily be left very much to the discretion of the judge who presides at the trial. It would doubtless be inexpedient in most cases to permit *ex parte* statements of

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facts or figures to be prepared and submitted to the jury. It should only be done where books and documents are multifarious and voluminous, and of a character to render it difficult for the jury to comprehend material facts without the aid of such statements, and even in such cases they should not be admitted unless verified by persons who have prepared them from the originals in proof, and who testify to their accuracy, and after ample time has been given to the adverse party to examine them and test their correctness. Such was the course pursued in the present case, and there can be no doubt that, in a trial embracing so many details and occupying so great a length of time as the case at bar, during which a great mass of books and documents were put in evidence, it was the only mode of attaining to an intelligible view of the cause before the jury.

KEARNEY v. MAYOR, ETC., OF NEW YORK.

New York Court of Appeals, 1883.

[Reported in 92 N. Y., 617.]

The rule that oral evidence of the contents of a document is not admissible until the absence of the writing has been explained, applies to such a writing as the endorsement of authority to publish, made on an official notice by the officer required by law to cause the notice to be published, when sought to be proved as authorizing the plaintiff, a newspaper publisher, to publish the notice.

It makes no difference that the law did not require the authorization to publish to be in writing.

Proof of the facts excusing the production of the original instrument so as to let in secondary evidence, is addressed to the trial judge and presents a question to be determined by him.

His determination that the explanation is insufficient cannot be reviewed in the Court of Appeals unless the proof was so clear and conclusive as to make it error of law to find against it.

To excuse the non-production of the original document by reason of its loss, the person last known to have been in possession of it must be examined as a witness, notwithstanding he is out of the jurisdiction; for his deposition should be procured or good excuse given.

The general rule is that the party offering such excuse must show that he has in good faith exhausted to a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him.

Testimony of one who had acted as assistant of the publisher of a newspaper during the transactions in question, that he and his employer had searched in vain in the archives of the newspaper office for a written authorization to make the publication, the price of which is sued for, is insufficient without accounting for omission to produce evidence of search by the principal himself, and among his own papers.

If the only witness to the circumstances relied upon as excusing the non-production of the best evidence, is the party himself, testifying in his own behalf, the judge is not bound, as matter of law, to credit the statements of a witness thus interested; and, therefore, his decision on the question whether the testimony is sufficient, cannot be reviewed in the Court of Appeals.

The complaint alleged that about a day named, one Scanlon, then and some time previously the publisher and owner of the "Irish Republic" newspaper in the city and county of New York was duly authorized by the officers or agents of the above

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named defendants [the mayor, aldermen and commonalty of that city] duly created and empowered by law and having lawful right and authority so to do, to print, publish and advertise in his said newspaper, a copy or copies of an election notice, authorized and ordered to be published according to law, for the period of eleven weeks, at the compensation of, &c., &c. It further alleged Scanlon's performance of the service, the amount due therefor, and that the service was worth that amount; and that the claim had been assigned to plaintiff, and also duly presented to the city authorities. The answer admitted only the corporate existence of the defendant, and denied all else, and alleged that the claim had been disallowed by the Board of Audit. Before the trial the publication and the assignment of the claim were admitted by stipulation.

At the trial the only contest was on the effort to prove that the sheriff, O'Brien, authorized the publication. Plaintiff, as a witness in his own behalf, testified that he was an assistant of Scanlon on the paper; that in pursuance of Scanlon's direction to go and get the notice to be published, he called on O'Brien; adding: "He gave me a written notice giving authority to publish the election notice.

Defendant's counsel. I object to his stating the contents of the written notice, and move to strike out that part of his answer.

Motion granted and exception taken.

Q. Did he give you the election notice? A. That is what was on it.

Q. What was on the back of it? Objected to, and excluded, and exception taken."

The witness further testified: "Afterward when the business of the paper was wound up, I remember making search among the records of the 'Irish Republic' newspaper for this election notice. I have made earnest and diligent search among my papers as well as among the papers of the 'Irish Republic' for this paper. I did not find the paper. I don't know what has become of it; it was lost. I haven't it anyhow."

On further inquiry the witness said that he remembered the

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contents of the authorization but not the exact words; that the authorization was in writing and that he did not remember that Mr. O'Brien said anything besides giving the paper when asked for an order to publish the notice.

He further testified: "I remember a search being made of this written order or election notice in connection with this publication. I made that search. Both Mr. Scanlon and myself searched all over for it. We were not able to find it."

Numerous questions put by plaintiff's counsel calling for the contents of the authorization and questions calling for what Mr. O'Brien said, were excluded.

Plaintiff asked to go to the jury on the question whether O'Brien authorized the publication, which was refused, and the court dismissed the complaint.

The New York Common Pleas at General Term affirmed the judgment of dismissal.

BEACH, J., delivering the opinion of the court, said: The testimony of the plaintiff showed the authority to publish the notice was in writing, to render parol proof of its contents, counsel stated his intention to prove the paper lost. It appeared the plaintiff delivered it to one Scanlon, the proprietor and publisher of the newspaper. He at some indefinite time afterwards searched among the records of the newspaper office for it, among his own papers, and at the time of and prior to the assignment, he and Scanlon searched for it in the archives of the newspaper office. This evidence did not prove the instrument lost. It was of great importance, being the foundation of the plaintiff's claim. In such case clear proof is required before parol statement of contents will be heard. The paper belonged to Scanlon, was shown in his possession, and may be there still, for all the testimony discloses. I am unable to imagine how its loss could have been legally shown without his evidence. Although he may not be within the State of New York, presumably his evidence could have been taken on commission. The remaining exception were to rulings of the court, rejecting or striking out parol evidence of the contents of the papers. (These were all correct, because the preliminary and vital fact of loss did not

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appear.) All such proof was incompetent and properly excluded. (Greenleaf on Evidence, Vol. 1, Sec. 558, and notes.)

The judgment should be affirmed with costs.

The Court of Appeals affirmed the judgment.

RAPALLO, J. The alleged employment by the sheriff, pursuant to chapter 480 of the Laws of 1860, of Scanlon, the plaintiff's assignor, to publish the election notice in the newspaper entitled "The Irish Republic," lay at the foundation of the plaintiff's supposed cause of action. The fact of such employment was put in issue by the answer. The plaintiff was the only witness called to prove it, and he testified that, at the request of Scanlon, he called upon the sheriff and asked him for the election notice. That the sheriff gave it to him with a written indorsement thereon, which indorsement, the plaintiff claims, contained an authorization to Scanlon to publish the notice.

The plaintiff then endeavored to give parol evidence of the contents of the written indorsement, but on objection being made, the court excluded such parol evidence.

The plaintiff then attempted to prove that the paper was lost, but the court held the proof insufficient, and excluded parol evidence of its contents. The plaintiff was then asked what was said by the sheriff at the time, and answered that he did not remember that he said anything. After this the witness was repeatedly pressed to state the contents of the writing indorsed on the notice, and to state what the sheriff said at the time, but all these questions were excluded, and the answers given by witness to some of them were stricken out.

There can be no doubt that the defendant had the right to insist on the production of the paper, and to object to parol evidence of its contents without proof of its loss. It is no answer to this objection to say that the law did not require the authority or contract of employment to be in writing.

The proof of loss of the paper was addressed to the trial judge and presented a question to be determined by him as matter of fact. His determination of the fact cannot be reviewed here, unless the proof of loss was so clear and conclusive that it was error of law to find against it. (*Jackson v. Frier*, 16 Johns., 193;

Stevens on Evidence, Article 71; *Mason v. Libbey*, 64 How. Pr., 267.) The proof in this case fell far short of that standard. According to the testimony of the witness he gave the paper to Scanlon. That is the last trace we have of it. The witness says that afterward, when the business of the newspaper was being wound up, he remembers making search among the records of "The Irish Republic" for the election notice; that he has made earnest and diligent search among his own papers, as well as among the papers of "The Irish Republic" for that purpose; that he and Mr. Scanlon together searched all over for it, but were not able to find it, and that Mr. Scanlon told witness he was unable to find it. He does not say where they searched, except among the papers of "The Irish Republic." It does not appear that search was made among Scanlon's papers. The witness says that he is quite positive that at the time of the assignment of the claim to him, and before that, the search for this notice was made in the archives of the newspaper office, that both he and Scanlon searched for it and it could not be found.

This is all the evidence in the case on the subject of the loss of the paper, and it is apparent at the first glance that it is anything but conclusive. The first glaring defect is that although the paper was last seen in Scanlon's possession, and although the witness says that Scanlon subsequently assisted in the search for it, he was not examined as a witness. The only excuse offered for this omission is the testimony of the plaintiff that since the assignment of the claim to him, Scanlon has not been living in the city, county and State of New York. It was not shown, however, that there was any difficulty in reaching him, and it has repeatedly been held that the person last known to have been in possession of the paper must be examined as a witness, to prove its loss, and that even if he is out of the State, his deposition must be procured, if practicable, or some good excuse given for not doing so (*Deaver v. Rice*, 2 Ired. [N. C.], 280; *Dickinson v. Breeden*, 25 Ill., 186; *Bunch's Adm'r. v. Hurst*, 3 Desaur Eq. [S. C.], 273; *Turner v. Yates*, 16 How. [U. S.], 14; *Parkins v. Cobbet*, 1 C. & P., 282). And the general rule is that the party alleging the loss of a material paper, where such proof is

Kearney v. Mayor, 92 N. Y., 617.

necessary for the purpose of giving secondary evidence of its contents, must show that he has in good faith exhausted, to a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him (*Simpson v. Dall*, 3 Wall., 460, 475).

The question being one of fact, it is not necessary to show that it would have been error in the trial judge to hold the proof of loss sufficient, and admit the parol evidence offered. The point which the appellant must establish is that the proof was so conclusive that it was error of law not to hold it sufficient, and if there were nothing else in the case, the fact that the only witness called to testify to the loss was the plaintiff himself, was enough to preclude this court from reviewing the decision of the trial judge and General Term. For the court below was not bound as matter of law to credit the statements of a witness thus interested, given in his own behalf, though uncontradicted by any other witness (*Elwood v. Western Union Tel. Co.*, 45 N. Y., 549; 6 Am. Rep., 140; *Nicholson v. Conner*, 8 Daly, 215).

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WALDELE v. N. Y. CENTRAL & HUDSON R. R. CO.

New York Court of Appeals, 1884.

[Reported in 95 N. Y., 274, reversing 29 Hun, 35.]

The *res gesta* of a railway casualty does not include declarations describing the casualty, made by a sufferer, though within half an hour after the accident and to the first person finding the sufferer.

In a civil case, the fact that declarations partake of the nature of dying declarations does not render them competent.

Catherine Waldele, as administratrix of John E. Waldele, deceased, sued for damages by injuries which caused his death.

The material facts appear in the opinion.

At the trial verdict was rendered in favor of plaintiff for \$3,000 which the court at Special Term set aside.

The Supreme Court at General Term reversed the order, thus allowing judgment on the verdict. SMITH, P. J. [*after stating facts and citing a number of cases, which are fully discussed in the Court of Appeals opinion which follows, said*]: The statement of the injured man, as to the cause of the accident, was made to his brother, who was the first person he saw after the occurrence, with whom he *could converse*, and it was so soon after the event as, in view of all the circumstances, to preclude the idea of design. It is, to a great extent, in the discretion of a trial judge, to say whether under all the circumstances of the case on trial, declarations of that nature are a part of the *res gestæ*, and his decision should not be reversed except for plain error or abuse of discretion. [Reported in 29 Hun, 35.]

The Court of Appeals reversed the judgment.

EARL, J. The intestate came to his death from injuries received on defendant's railroad in the city of Rochester, near midnight, July 1st, 1876. He was an educated deaf-mute, intelligent, and in possession of all his faculties, except that of speech and hearing. He was familiar with the railroad at the place where he was injured; and was probably attempting to cross the railroad on his way home at the time he was struck by an engine

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and fatally injured. No one saw the accident, but the theory of the plaintiff is that as he approached the railroad tracks, a freight train came from the east, and he waited for that to pass, and then started to cross the track and was struck by an engine backing in the same direction at a distance of about fifty feet in the rear of the train. The manner of the accident, and whether it was caused solely by the negligence of the defendant, without any contributory negligence on the part of the intestate, were matters of controversy at the trial. The evidence to support the theory of the plaintiff was all circumstantial, except declarations of the intestate which were read in evidence.

Shortly after the passage of the train and the engine, the groans of the intestate were heard, and he was found lying upon the southerly or outer track of the railroad, about fifteen feet from the sidewalk, badly bruised and mangled. He was soon removed to the sidewalk, and afterward to the hospital, where he died in about three hours. After he was removed to the sidewalk, his brother, also a deaf-mute, was sent for; and about thirty minutes after the accident, he there obtained from him by signs, the declarations the reception of which in evidence are complained of as error. He was produced by plaintiff as a witness and was asked: "What did he tell you?" To this defendant's counsel objected, on the grounds (1) "that the declarations of the deceased are incompetent; (2) that they are no part of the *res gestae*; (3) that whatever the conversation may have been, it took place at a time considerably subsequent to the time of the injury, at a place other than where the injury occurred; (4) that the evidence is inadmissible for any purpose." The Court overruled the objections and the defendant's counsel excepted. The counsel further objected to the reception of the evidence, "upon the ground that the declarations of the deceased are not competent for the purpose of establishing either negligence on the part of the defendant, or absence of negligence on the part of the deceased." The court overruled the objection, and defendant's counsel again excepted. The witness then answered: "John said he got hit. John said there was a long train, that he stood waiting for it to go, and an engine followed and struck him." The counsel in objecting to this evidence, and the court in ruling upon the objection must

have known what evidence was sought to be elicited by the question, as the case had before been tried, and the same evidence had been given (19 Hun, 69). It is not disputed that this evidence was quite material, and we cannot say that it was not very damaging to the defendant upon a vital issue. Was it competent? We think not.

The claim that the declarations can be treated as part of the *res gesta* is not supported by authority in this state. The *res gesta*, speaking generally, was the accident. These declarations were no part of that—were not made at the same time, or so nearly contemporaneous with it as to characterize it, or throw any light upon it. They are purely narrative, giving an account of a transaction not partly past, but wholly past and completed. They depend for their truth wholly upon the accuracy and reliability of the deceased, and the veracity of the witness who testified to them. Nothing was then transpiring or evident to any witness which could confirm the declarations or by which, upon cross-examination of the witnesses testifying, or by the examination of other witnesses, the truth of the declarations could be tested.

It is not easy always to determine when declarations may be received as part of a *res gesta*, and the cases upon this subject in this country and in England are not always in harmony. The case of *Commonwealth v. McPike* (3 Cushing, 181), and *Insurance Company v. Moseley* (8 Wall., 397), are extreme cases upon one side, and would justify the reception of these declarations. The case of *Regina v. Bedingfield* (14 Cox's Cr. Cases, 341), is an extreme case upon the other side, and goes much further than would be needed to justify the exclusion of these declarations. That case was decided by Lord Chief Justice Cockburn, after consulting with Field and Manisty, JJ., and aroused much discussion and criticism in England. (*Bedingfield's Case*, 14 Am. Law Review, 817; 15 *id.*, 71.)

The rule as to *res gesta* laid down in *Commonwealth v. McPike*, has since been limited, and very properly applied in other cases in that state. In *Lund v. Tyngsborough* (9 Cush., 36), in view of the frequent recurrence of questions in regard to the admission of declarations claimed to be part of some *res gesta*,

the court undertook to set forth and illustrate with some particularity the principles and tests by which such questions must be determined and among other things said :

“ When the act of a party may be given in evidence, his declarations made at that time, and calculated to elucidate and explain the character and quality of the act, and so connected with it as to constitute one transaction and so as to derive credit from the act itself, are admissible in evidence. The credit which the act or fact gives to the accompanying declarations as a part of the transaction, and the tendency of the contemporary declarations as a part of the transaction to explain the particular fact distinguish this class of declarations from mere hearsay ; ” and further : “ Such a declaration derives credit and importance as forming a part of the transaction itself, and is included in the surrounding circumstances which may always be given in evidence to the jury with the principal fact.

There must be a main or principal fact or transaction ; and only such declarations are admissible as grow out of the principal transaction, illustrate its character, are contemporary with it, and derive some degree of credit from it.” In *Commonwealth v. Hackett* (2 Allen, 136), upon a trial for murder, a witness testified that, at the moment the fatal stabs were given, he heard the victim cry out : “ I am stabbed,” and he at once went to him and reached him within twenty seconds after that, and then heard him say : “ I am stabbed—I am gone—Dan Hackett has stabbed me.” This evidence was held competent as part of the *res gesta*. BIGELOW, Ch. J., speaking of this evidence, said : “ If it was a narrative statement wholly unconnected with any transaction or principal fact, it would be clearly inadmissible. But such was not its character. It was uttered immediately after the alleged homicidal act, in the hearing of a person who was present when the mortal stroke was given, who heard the first words uttered by the deceased, and who went to him after so brief an interval of time that the declarations or exclamations of the deceased may fairly be deemed a part of the same sentence as that which followed instantly, after the stab with the knife was inflicted. It was not, therefore, an abstract or narrative statement of a past occurrence, depending for its force and effect

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solely on the credit of the deceased, unsupported by any principal fact, and receiving no credit or significance from the accompanying circumstances. But it was an exclamation or statement contemporaneous with the same transaction, forming a natural and material part of it and competent as being original evidence in the nature of *res gestæ*." The learned judge also said that the rule which renders *res gesta* competent has been often loosely administered by courts of justice so as to admit evidence of a dangerous and doubtful character; and that the tendency of recent decisions has been to restrict within the most narrow limits this species of testimony; and that that court was disposed to apply the rule strictly, and to exclude everything which did not clearly come within its just and proper limitations.

In these cases (the last two) I think the rule under consideration was correctly laid down and applied, and properly defined and limited.

In *Rockwell v. Taylor* (41 Conn., 55) the rule was laid down thus: "To make declarations on this ground admissible, they must not have been mere narratives of past occurrences, but must have been made at the time of the act done, which they are supposed to characterize, and have been well calculated to unfold the nature and quality of the acts they were intended to explain; and to so harmonize with them as to constitute a single transaction." In *Hanover Railroad Company v. Coyle* (55 Penn. St., 396) the action was against a railroad company for injuring the plaintiff by negligence; and the trial court admitted declarations of the engineer by whose negligence the plaintiff was injured, made at the time of the injury, as part of the *res gesta*; and it was held that they were properly admitted. AGNEW, J., writing the opinion and speaking of the declaration of the engineer, said: "It was made at the time of the accident, in view of goods strewn along the road by the breaking of the boxes; and seems to have grown directly out of and immediately after the happening of the fact. The negligence complained of being that of the engineer himself, we cannot say that his declarations, made upon the spot, at the time, and in view of the effects of his conduct, are not evidence against the company as a part of the very transaction itself."

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Without further calling attention to cases outside of this state, I will now refer to a few cases decided by this court in further illustration of this rule. In *Moore v. Meacham* (10 N. Y., 207), the plaintiff sought to show his own declarations while performing, or endeavoring to perform, his agreement for the purpose of characterizing the agreement itself, and they were held incompetent. GRAY, J., writing the opinion, said :

“The general rule is that declarations, to become a part of the *res gestæ*, must accompany the act which they are supposed to characterize and must so harmonize as to be obviously one transaction.” In *Luby v. H. R. R. Co.* (17 N. Y., 131), the action was for alleged negligence in running a railroad car, drawn by horses, against the plaintiff in one of the streets of the City of New York. Upon the trial he was allowed to prove that, immediately after the accident, a policeman arrested the driver of the car, and that, upon arresting him, as he was getting off the car, and out of the crowd which surrounded him, he asked why he did not stop the car ; to which the driver replied, that the brake was out of order. This evidence was objected to on the part of the defendant. The plaintiff recovered a judgment which was affirmed by the Supreme Court at General Term. The defendant then appealed to this court, and the judgment was reversed on two grounds—(1) because proof of the arrest was allowed ; (2) because the declaration of the driver was received. Upon the latter ground, COMSTOCK, J., writing the opinion, said : “The declarations of an agent or servant do not, in general, bind the principal. Where his acts will bind, his statements and admissions respecting the subject-matter of those acts will also bind the principal if made at the same time, and so that they constitute a part of the *res gestæ*. To be admissible they must be in the nature of original and not hearsay evidence. They must constitute the fact to be proved, and must not be the mere admission of some other fact. They must be made not only during the continuance of the agency, but in regard to a transaction depending at the very time ;” and further : “The declaration was no part of the driver’s act, for which the defendants were sued. It was not made at the time of the act, so as to give it quality and character. The alleged wrong was complete, and

the driver, when he made the statement, was only endeavoring to account for what he had done." In *Hamilton v. N. Y. C. R. R. Co.* (51 N. Y., 100), the plaintiff was ejected from the cars of the defendant on his way from Utica to Albany, at St. Johnsville, by the conductor, because he did not then have a ticket, and was unwilling to pay his fare. He then paid his fare under protest, and re-entered the car, and went to Albany. Shortly after reaching Albany he went to the conductor, and, with the assistance of the person who had acted as conductor west of Utica, satisfied him that he paid his fare, whereupon the conductor refunded the fare to him; and he was allowed to prove, against the objection of the defendant, a conversation then had between him and the conductor, in which the latter applied to him very slanderous and abusive epithets as a part of the *res gesta*. The Commission of Appeals held that that evidence was erroneously received, and reversed the judgment and granted a new trial, holding that that conversation, although it took place at the time the conductor refunded the fare, was not a part of the *res gesta*, in a suit to recover damages for being ejected from the cars at St. Johnsville. In *Whitaker v. Eighth Ave. R. R. Co.* (51 N. Y., 295), the action was brought to recover damages for an injury caused by the willful act of one of the defendant's car drivers in running one of its cars against the plaintiff, and throwing him into an excavation by the side of the track; and the plaintiff, in order to sustain his allegation of the driver's intention to do him an injury, was permitted to prove by a witness that immediately after the car passed he heard the driver cursing and damning the plaintiff, saying: "Let him fall in and be killed." The trial judge held that the declaration was a part of the *res gesta* and, therefore, admissible. The evidence was objected to on the part of the defendant, and the Commission of Appeals decided that it was error to receive it; and for that and other reasons reversed the judgment and granted a new trial, holding that the declaration made by the driver after the car had passed and the injury was done, was no part of the *res gesta*. In *People v. Davis* (56 N. Y., 95), upon an indictment under the statute against abortions, the woman upon whose person the abortion was attempted being dead, the district attorney was permitted to

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prove that she went away with the defendant in a buggy, and returned in the night, and what, on a return, she said to a witness had been done and said to her by the doctor who performed the operation upon the alleged procurement of the defendant. This evidence was objected to on the part of the defendant and the General Term reversed the judgment of conviction by the Oyer and Terminer. The case was then brought into this court by writ of error on behalf of the people; and the decision at the General Term was affirmed, this court holding that the declarations proved were simply a narrative of a past transaction, and not competent as a part of the *res gestæ*. GROVER, J., writing the opinion of the court, said: "In this case the thing done, or *res gestæ*, was at the doctor's office in another town, and it is clear that its narration by the deceased was no part of that thing. Any thing said accompanying the performance of an act explanatory thereof, or showing its purpose or intention, when material, is competent as a part of the act. But when the declarations offered are merely narratives of past occurrences they are incompetent. That is precisely this case. The declarations given in evidence were a mere statement of what had been done at the doctor's office, and not any part of what was then done, and, therefore, no part of the *res gestæ*;" and speaking of the case of the *Ins. Co. v. Mosley*, *supra*, he said that the doctrine as to what may be regarded as a part of the *res gestæ* was certainly carried to its utmost limit in that case by the majority of the court. And he further very appropriately said: "The length of time between the act and its subsequent narration by one of the actors I do not regard as material. The question is, did the proposed declaration accompany the act, or was it so connected therewith as to constitute a part of it? If so, it is a part of the *res gestæ* and competent; otherwise, not."

In *Tilson v. Terwilliger* (56 N. Y., 273) Folger, J., lays down the rule as to the *res gesta* declarations as follows: "to be a part of the *res gesta* they must be made at the time of the act done, which they are supposed to characterize; they must be calculated to unfold the nature and quality of the acts which they are intended to explain; they must so harmonize with those facts as to form one transaction. There must be a transaction of which

they are considered a part; they must be concomitant with the principal act, and so connected with it as to be regarded as the result and consequence of co-existing motives." In *Casey v. N. Y. C. & H. R. R. Co.* (78 N. Y., 518) it was held, as stated in the head note, that "the testimony of a witness as to what occurred after the accident was competent as part of the *res gestæ*;" but it was so held for the reason that the occurrences there referred to constituted a part of the transaction. A child had been run over, and on the trial a police officer, who went to the place of the accident immediately after the child was killed, and found the child under the wheels of the car, was permitted as a witness for the plaintiff to state what the engineer in charge of the engine said and did in extricating the body of the child from under the wheels of the car. The evidence was clearly competent as a part of the *res gesta*.

The counsel for the plaintiff, in his argument before us to justify this evidence, cited but two cases from the reports of this State; *Swift v. Mass. Mut. Life Ins. Co.* (63 N. Y., 186), and *Schnicker v. People* (88 N. Y., 192). In the first case it was held that in an action upon a policy of life insurance, issued upon the life of one person for the benefit of another, evidence of declarations made to third parties by the insured at a time prior to, and not remote from, that of his examination and in connection with facts, or acts, exhibiting his then state of health (for instance, declarations made by him when apparently ill, as to the nature or cause of his illness) is competent upon the question as to the truthfulness of statements made by him to the examining physician, as to his knowledge that he had, or had not had, a certain disease, or symptoms of it. It is difficult to perceive how any thing decided in that case, or stated in the opinion of the court, can have any material bearing upon this. In the second case, *Schnicker* was indicted for the offense of taking a woman, unlawfully against her will, with the intent to compel her by force, menace, or duress to be defiled. The evidence tended to show that the prosecutrix went to a house of prostitution kept by the prisoner, not knowing the character of the house, for the purpose of obtaining employment as a domestic; that the prisoner detained her there by exciting her

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fears that if she left she would be arrested, and by keeping the outer door locked; that the prisoner plied her daily with solicitations to consent to the defilement of her person, but she refused; that finally the prisoner told her to go up stairs with a man, and upon her refusal, opened the door of the room where she was and shoved her into the hall, whereupon she went upstairs to her room, and in a half hour after a man called the "boss" came to her room with another man and left him there, and this man by force defiled her; and it was held that the evidence as to what occurred in the room of the prosecutrix was properly received; that the occurrence was part of the *res gesta* and might reasonably be inferred to have been in pursuance of the scheme of the prisoner to subject the prosecutrix to defilement. Judge ANDREWS, writing the opinion of the court said: "We think the evidence was competent. It was so closely connected in point of time with the direction of the prisoner, that the prosecutrix should go to her room with a man, as to constitute a part of the *res gesta*, and what followed, might reasonably be inferred to have been in pursuance of the scheme of the prisoner to subject the prosecutrix to defilement." That case furnishes no support for the claim of the plaintiff, that the declarations in this case were properly received.

I have now called attention to the principal authorities in this State, upon the doctrine of *res gesta* evidence, and I have examined all the other cases which have been reported in this State relating to the doctrine, and I confidently assert that there is no authority in this State for holding that this evidence was competent. Here the *res gesta*, strictly and accurately speaking, was not the fact that the intestate was injured, nor the fact that he was injured by coming in collision with the engine. These facts were apparent and undisputed. But the point of inquiry was, how he came to be hit by the engine, with the view of ascertaining whether the accident was solely due to the negligence of the defendant, or partly, or wholly due to the negligence of the intestate. The manner of the accident was, therefore, the *res gesta* to be inquired into; and these declarations made after the accident had happened, after the train had passed from sight, and the whole transaction had terminated were no part of

that *res gesta*, had no connection with it, and were purely narrative. It has been well said, that *res gesta* must be a *res gesta* that has something to do with the case, and then the declaration must have something to do with the *res gesta*. It cannot be said that these declarations were in such manner connected with the *res gesta* as to constitute one transaction so that they and the *res gesta* were parts of the same transaction. They were not made under such circumstances that they are in any way confirmed by the *res gesta*, and they had no relation to what was then present, or had just gone by. Suppose the intestate had been found at that point with a mortal wound freshly inflicted by some person; and he had charged that an individual, naming him, had thirty minutes before caused the wound; would that declaration have been competent upon the trial of the person thus charged with the murder? Clearly not, within the principles laid down in the cases which I have cited. Suppose in this case the person had been found there with a wound upon his head; and he had stated that the engineer upon one of these engines had struck him, as the engine passed, and the engineer had been upon trial for the offense; would the declaration have been competent? It makes no difference that the intestate had died, and could not therefore be called as a witness. If these declarations were competent, they would have been no less competent if he had survived and brought the action himself, and had been a witness upon the trial. Suppose the engineer upon the engine which struck the defendant had, at the precise time when these declarations were made, also made declarations either favorable or unfavorable to the defendant, could they have been given in evidence as a part of the *res gesta*? In view of the authorities which I have cited, that will not be claimed, and yet if these declarations were competent, those made at the same time by the engineer would have been competent; and this illustrates, too, how important it is that a correct rule upon this subject should be laid down in this case.

This evidence cannot be received upon the theory that there is a very strong probability that the declarations made by the intestate were true. The probability would have been equally strong if they had been made several hours later when he was

removed to the hospital. The probability is that as he neared his death, he would have told the truth, if he said anything about it. The same may be said of many statements not under oath. They are frequently made under such circumstances as entitle them to very great, and frequently to implicit confidence; and yet they do not answer the requirements of the law—that a party prosecuted shall be confronted with the witnesses, shall have an opportunity of cross-examination, and that the evidence against him shall be given under the test and sanction of a solemn oath. Declarations which are received as part of the *res gesta* are to some extent a departure from or an exception to the general rule; and when they are so far separated from the act which they are alleged to characterize that they are not part of that fact or interwoven into it by the surrounding circumstances so as to receive credit from it and from the surrounding circumstances, they are no better than any other unsworn statements made under any other circumstance. They then depend entirely upon the credit of the persons who testify to them, and hence are of no more value as evidence in a legal proceeding than the unsworn declarations of a person under any other circumstances.

Even dying declarations are not received in civil actions unless part of the *res gesta*. Such declarations made in the immediate presence of death, under the most solemn circumstances, when all motive to pervert the truth may be supposed to have ceased to operate, are received only in trials for homicide of the declarant in cases where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declarations. It is said that the reasons for thus restricting the rule may be that credit is not in all cases due to the declarations of a dying person, for his body may survive the powers of his mind; or his recollection, if his senses are not impaired, may not be perfect; or for the sake of ease, and to be rid of the importunity and annoyance of those around him may say, or seem to say, whatever they may choose to suggest. The rule admitting dying declarations as thus restricted stands only upon the ground of the public necessity of preserving the lives of the community by bringing man-slayers to justice (*Greenl. on Ev.*, § 156).

There is no middle ground for receiving declarations of this character—that is, they must be received either as dying declarations or as declarations forming part of the *res gesta*.

But it is said that although this evidence may have been incompetent to show how the accident happened, it was competent to explain the condition of the intestate at the time he made the declarations. It is clear, however, that they were not received for that purpose. There was no dispute about his condition. It was not questioned that he was badly mangled and bruised, and that his injuries were received upon the defendant's railroad by contact with one of its engines; and so far as the declarations tended to show that he was simply hit by an engine, and received his injuries in that way, they were wholly unnecessary and immaterial. The sole point of the evidence was to show that he approached the track, waited for a long train to pass, and then in attempting to cross the track, was struck by an engine backing in the same direction, thus making a question for the jury as to the contributory negligence on his part. For that purpose the evidence was incompetent, and that was the sole purpose, manifestly, for which it was offered or received. Suppose the intestate had been found there with a mortal stab inflicted half an hour before, and he had said, "I am stabbed, John Doe did it!" and the evidence had been objected to and received, would it have been an answer to say that it was competent to show his then present condition, and that the whole evidence should not, therefore, have been excluded? The stab would have been apparent, and the declarations wholly immaterial and unnecessary to show it, and the sole purpose and effect of the evidence would have been to show who the murderer was. So here the evidence was given for the sole purpose of showing what took place at the time the intestate was injured, and not for the purpose of characterizing his condition at the time he spoke.

We are, therefore, of opinion that an important rule of evidence was violated in receiving these declarations, and that upon that ground the judgment should be reversed and a new trial granted.

All the judges concurred, except RAPALLO, J., not voting, and DANFORTH, J., not sitting.

Judgment reversed.

Davidson v. Cornell, 132 N. Y., 228.

DAVIDSON v. CORNELL.

New York Court of Appeals, 1892.

[Reported in 132 N. Y., 228.]

In an action for personal injuries, declarations of the plaintiff as to his injuries, to be proved at the trial must have related to present and not past pain and suffering.

In an action for personal injuries, declarations of plaintiff to his physician consisting not of exclamations of present pain and suffering, but of statements of the effect upon him of the injury and the consequences which had followed from the time it occurred, a period of nearly fifteen months,—*Held*, hearsay, the admission of which was error.

Such evidence is not made competent by being corroborated by plaintiff's own testimony at the trial.

Statements expressive of present condition are allowed in evidence only when made to a physician for the purpose of treatment by him.

It seems that non-expert testimony as to involuntary exclamations of present pain is competent.

Plaintiff sued for damages sustained while in defendants' employ, aiding them in building an elevated railroad. The structure gave way and fell to the ground while plaintiff was working upon it, thus casting plaintiff to the street below and severely injuring him.

At the trial Dr. Corey, a medical witness for plaintiff, testified that he examined plaintiff more than a year after the injury and formed an opinion that plaintiff's spinal cord was injured. The symptoms were want of sensation in the lower extremities, tenderness over part of the spine and loss of sexual power; adding: "of course, my opinion in that respect must rest upon his declarations." . . . [which the witness proceeded to repeat.]

The court denied a motion to strike out the evidence, but said that it would be stricken out unless plaintiff himself testified to the fact.

Plaintiff afterward testified to the existence of the facts indicated by the medical witness.

Plaintiff had a verdict for \$2,500.

The City Court of Brooklyn at General Term affirmed the judgment, holding, that this was a proper disposition of the

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objection, and preserved all defendants' right; these statements of plaintiff were incidental to the medical examination, and contributed to its completeness and efficiency.

Although similar statements made by a layman have, heretofore, been held inadmissible on the ground in part, that they were hearsay, and in part, that it afforded an opportunity to unduly exaggerate the injuries complained of, these objections, however, were removed by the plaintiff's testimony that the statements made by him to Dr. Corey were true.

The Court of Appeals reversed the judgment.

BRADLEY, J. [*after passing upon other questions*]: As a general rule, declarations made out of court by a party are not admissible as evidence in his behalf. But his statements to his attending physician of the nature of the symptoms of his malady or suffering have quite uniformly been held admissible, and from necessity they were formerly deemed competent when made to persons other than medical attendants under some circumstances. (*Caldwell v. Murphy*, 11 N. Y., 416; *Werely v. Persons*, 28 *id.*, 344; *Matteson v. N. Y. C. R. R. Co.*, 35 *id.*, 491.) But since the Code permits parties to make their statements under oath as witnesses, that necessity in this state has ceased to exist, and, as a rule, declarations made to persons other than the medical attendant of the party, are not admissible as evidence. (*Reed v. N. Y. C. R. R. Co.*, 45 N. Y., 574; *Roche v. Brooklyn City, etc., R. R. Co.*, 105 *id.*, 294.)

It was, however, held in *Hagenlocher v. C. I. & B. R. R. Co.* (99 N. Y., 136), that the evidence of a non-medical witness, that the plaintiff (who had received an injury) manifested pain by screaming, was held competent, because it was apparently involuntary and corroborated by what appeared to be her condition. The rule of admissibility of statements made to physicians by persons who have been physically injured, or are suffering from disease, is not an unqualified one. They must relate to present and not past pain and suffering. (*Towle v. Blake*, 48 N. H., 92.) And it has been held that their declarations, after controversy had arisen, made at a medical examination then had for the purpose of preparing evidence, and not for medical treatment, were in-

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competent. (*Grand Rapids & Ind. R.R. Co. v. Huntley*, 38 Mich., 537; *Jones v. Prest., etc., of Portland*, 50 N. W. R., 731.) In *Matteson v. N. Y. C. R. R. Co.* (35 N. Y., 487), it was held that expressions of pain and suffering made by the injured person to physicians when they were examining him were competent evidence, notwithstanding the examination was made by them with a view to testifying as to the result of it in a suit then pending. The same was said in *Kent v. Town of Lincoln* (32 Vt., 591). It may be seen that when attended by a physician for the purpose of treatment there is a strong inducement for the patient to speak truly of his pains and sufferings, while it may be otherwise when medically examined for the purpose of creating evidence in his own behalf. It is, therefore, that the weight of judicial authority is to the effect that the statements expressive of their present condition are permitted to be given as evidence only when made to a physician for the purposes of treatment by him. (*Barber v. Merriam*, 11 Allen, 322; *Fay v. Harlan*, 128 Mass., 244; *Roche v. Brooklyn City, etc., R. R. Co.*, 105 N. Y., 294.)

In the present case the declarations in question of the plaintiff were not instinctive, nor were they made to the physician with a view to medical treatment. They consisted not of exclamation of present pain or suffering, but were the plaintiff's statements, so far as called for by the doctor, of the effect upon him of the injury and the consequences which had followed in such respects from the time it occurred, a period of nearly fifteen months. This was hearsay, and is very different from that of a medical witness, as the expressions by a patient or person suffering from injury or disease, indicating pain or distress, or expressive of the present state of his feelings in that respect. We think the reception of the evidence was error. And although the plaintiff testified to the truth of the statements made to the doctor, his evidence did not cure the error. The character of his injury was an important fact as bearing upon the question of damages. And although his evidence may have constituted the basis in part at least of a hypothetical question for the opinion of the doctor, it cannot be said that evidence given by the latter of the plaintiff's declarations were not prejudicial to the defendants. The plaintiff's interest as a party presented the question of his credibility for the jury,

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and his evidence could not properly be corroborated by proving that the facts to which he testified corresponded with the declarations made by him to the doctor. This, for the support to the plaintiff's evidence, was not admissible. (*Robb v. Hackley*, 23 Wend., 50; *Reed v. N. Y. C. R. R. Co.*, 45 N. Y., 574.)

The other exceptions taken require no consideration, as they may not necessarily arise upon another trial.

The judgment should be reversed and a new trial granted, with costs to abide the event.

All the judges concurred.

Judgment reversed.

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PEOPLE v. SMITH.

New York Court of Appeals, 1887.

[Reported in 104 N. Y., 491.]

Whether declarations were made under such a sense of impending death, as to render them competent as dying declarations, is a preliminary question for the trial judge.

How far the trial judge shall go in hearing the evidence of such declarations, in order to ascertain the mental condition of the declarant, is a question of judicial discretion.

It is not error to allow this evidence to be taken in the hearing of the jury if they are afterward instructed as to what is actually received as competent for them to consider.

Indictment for murder:

The facts as stated by ANDREWS, J., were as follows: The defendant was jointly indicted with one Alexander Sweeney, in the Court of General Sessions, in the city of New York, for the murder of John Hannon, by shooting with a pistol, April 7, 1885. He was separately tried, and was convicted of murder in the first degree. The transaction took place at about six o'clock in the evening, at a shanty at the foot of Thirty-eighth street, in the city of New York, where the deceased was employed as a watchman in the street-cleaning department. The deceased was at the time sitting or lying on a bench in the shanty, and a man named Tracy was in the room, sitting by and leaning upon a table. Tracy saw Smith and Sweeney enter the door, and he pretended to be asleep. He testifies that they had some conversation in a whisper, which was followed almost immediately by the report of a pistol, and they then turned and left the place. Tracy, seeing that Hannon was shot, followed the two men and pointed them out to officers who arrested them. The shooting was done on Tuesday evening. Hannon was taken the same evening to Bellevue Hospital and died there the Saturday following. It was found that the ball had penetrated the skull, over the right eye, entering the brain.

There was no controversy on the trial that the shot proceeded from a pistol in the hands of the defendant. The defence was

that the shooting was unintentional and accidental. The testimony of the defendant, who was sworn as a witness in his own behalf; tended to support this explanation. The theory of the prosecution was that it was a deliberate and premeditated murder, committed by Smith and Sweeney, acting in concert, from enmity, each having a grudge against the deceased. The prosecution, in support of this theory, proved that Smith and Sweeney had known each other from boyhood and were intimate friends, and they were also acquaintances of the deceased. For the purpose of showing the hostility of Sweeney to the deceased, the prosecution was permitted, against the objection of the defendant's counsel, to show that a fight had occurred between them on the day before the homicide. It was also shown by the evidence of the mother and sister of the deceased, that about two years prior to the homicide an altercation took place between the defendant and the deceased, during which the former drew a pistol, and that on that occasion the defendant threatened to kill Hannon "if it is twenty years to come." The people further, to support the indictment, offered evidence of declarations made by the deceased to his mother at the hospital on Wednesday morning, the day after the shooting, and also to his sister on Thursday morning.

The principal and serious allegations of error relate to this evidence, first, as to whether the declarant made the declarations under a sense of impending death, within the rules governing the admission of dying declarations, and, second, whether the court committed a legal error in permitting declarations of the deceased to be proven in the first instance, not relating to the immediate circumstances of the death, and which the court subsequently ordered to be stricken out. In respect to the first question, viz., whether the deceased at the time of making the declarations was in such condition of body and mind, and had such a sense of impending dissolution as to make his declarations admissible, we entertain no doubt. As the sequel proved, he had received a mortal wound. His conversation with his mother indicated that he considered his condition hopeless. He said: "Yes, mother, I am shot; mother will you take me home? the Bellevue people are good; they are good enough, but they can

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do nothing for me." The mother said: "Johnny, the doctor don't say so, the doctor says you will get well." He said: "Mother, lift me up, kiss me, kiss me, because I am going to die; the bullet that Pete Smith put in my head, it is in it, and it will fetch me and leave you without your only son." There was other conversation not necessary to repeat. Suffice it to say that all his statements as to his condition, indicate that both on Wednesday and Thursday mornings he had a settled conviction that he was fatally wounded and that death was imminent.

It would not be profitable to go over the cases as to the preliminary proof necessary to entitle dying declarations to be given in evidence. Each case differs in its circumstances, and the cases are not all reconcilable, the rule admitting dying declarations is anomalous, and courts are strict in requiring that, before admitting them, it shall be made clearly to appear that the declarant was, in fact, resting under the shadow of death from the fatal stroke, and so believed, entertaining no hope of recovery. The circumstances proved in this case bring it within the rule, according to the best considered authorities. (*Reg. v. Howell*, 26 Law J. [M. C.] 43; *Reg. v. Jenkins*, 11 Cox. Cr. C. 250; *Reg. v. Peel*, 2 Fost. & F. 21; 3 Russ. on Cr. [4th Eng. ed.] 250 et seq.; 1 Greenl. Ev. chap. 9.)

The more serious question arises in respect to the alleged error of the court in admitting declarations made by the deceased in relation to matters not the proper subject of proof by dying declarations. The course of the trial upon this point, as disclosed by the record, was this: The mother of the deceased, on being called and sworn as a witness for the people, was asked by the prosecuting attorney to state the conversation she had with the deceased at the hospital on Wednesday morning. The defendant's counsel interposed an objection that it was not "in the nature of an *ante mortem*, and was inadmissible." The court replied, "I cannot determine whether it is or not until I hear it." On the defendant's counsel repeating the objection, the court stated, "Mr. Palmer, rather than you should interrupt at every question put to the witness," you may consider an objection an exception to every question put to the witness. The witness was

again asked to state the conversation, when the defendant's counsel asked the court if it had decided to admit declarations of Hannon when not in fear of imminent death, and the court replied that it had not, adding, "How do I know as yet but that they were made in anticipation of immediate death?" The defendant's counsel then asked to be permitted to cross-examine the witness on that point, but the court denied his request, saying that when the district attorney got the statement of the witness, the defendant's counsel could then cross-examine, and the court would decide whether it came within the rule, and to this ruling an exception was taken. The district attorney then proved by the mother, the declarations of the son heretofore stated, and said. "Now I think we have laid the foundation for declarations." The court then took up the examination of the witness, and she proceeded, in answer to the question of the court and the district attorney, to give testimony occupying four printed pages of the case, narrating the whole conversation with her son. Much of the evidence was elicited by answers to specific questions as to declarations having no relation to the *res gestae* of the homicide. After an examination of the witness, covering twenty printed pages, embracing many subjects other than the interview at the hospital, the court directed the stenographer to read to the jury from his stenographic notes a part of the evidence of the witness pointed out by the court, of the conversation with her son, which embraced the evidence which has been detailed, showing Hannon's expectation of death, and also his declarations as to the circumstances of the murder, and directed that the further evidence of the witness of what transpired at the interview, should be stricken out and disregarded by the jury. The portion of the evidence directed to be read to the jury is enclosed in black lines in the error book, and occupies about a printed page of the testimony. Following the testimony admitted, is the testimony stricken out, which occupies three printed pages.

In the testimony thus stricken out were statements made by the deceased in regard to the cause of the altercation and the account of all his ensuing conversations with his mother, relating to the controversy.

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The Court of General Sessions convicted defendant of the crime of murder in the first degree.

The Supreme Court at General Term affirmed the judgment. No express ruling on this point.

The Court of Appeals affirmed the judgment.

ANDREWS, J., was of the opinion that it was error to receive evidence of declarations other than those which may go to the jury as dying declarations, and that the error was not cured by striking them out and directing the jury to disregard them.

But the majority of the court held otherwise. FINCH, J., said: We all agree in this case that no error was committed upon the trial, unless as to the single point which, in the opinion of ANDREWS, J., is deemed sufficient ground for ordering a new trial. That opinion states fully and accurately the facts disclosed by the proofs, and shows that the killing was admitted, and the only issue that remained was whether the fatal shot was accidental or intentional. It further holds that when the admissibility of the dying declarations of Hannon was brought in question, it became the duty of the court to determine, as a preliminary issue, whether the alleged declarations were made by the deceased under a conviction of approaching and imminent death, and that such necessary preliminary examination might, in the discretion of the court, be conducted in the presence of the jury. When the dying declarations of Hannon were offered by the prosecution, the defence objected upon the ground that they were not such. The trial judge answered, in substance, that he could not determine that question until he knew whether or not they were made in anticipation of approaching death. The defence then claimed a right to cross-examine "upon that point." The judge answered, "not just yet," and finally said, before the preliminary examination began, "when the district attorney gets the statements of the witness you may cross-examine and I will then determine whether it comes within the rule." At this stage of the case there seems to have been no room for a misunderstanding as to what was at the moment before the court. It was an issue of law to be determined by the court upon facts addressed to it and with which the jury had nothing whatever to

do. The defence so understood it, for they sought to enter at once upon a cross-examination of the witness on that point. Everybody understood that the admission of any declarations of Hannon was stayed and barred, until upon the examination by the prosecution and the cross-examination by the defence, the issue of admissibility should be tried and determined by the court. During the trial of that preliminary issue the jury stood merely in the attitude of spectators. They had no concern with it, and knew from the statements of the court that they had not. They understood that out of its result something might come before them as evidence, or nothing, and that until the judge ruled, the facts developed were for his consideration and not for theirs. The fact that their presence was not error shows that, in the judgment of the law, a jury must be deemed capable of that amount of discrimination at least. And thus the trial of the preliminary issue before the court was entered upon with the complete knowledge and understanding of all parties. The district attorney proceeded at once to the precise point and proved the statement of Hannon to his mother, that he was "going to die." At the close of about one-half of a printed page, directed to the issue before the court the prosecution said: "Now we think we have laid the foundation for declarations." The judge seems not to have been entirely satisfied. The mother had given to her son the doctor's assurance that he would get well. It had produced no apparent effect at the moment, but who could tell that the rest of the conversation occurring thereafter should be disclosed there might not appear a hope of recovery born of that assurance, or a spirit of hatred and revenge inconsistent with the solemn truth of statements in the presence of death? The prosecution had obtained enough for its purpose, but the court had a duty to its own conscience; a duty not to be hasty or to be misled, and to make sure that it fully and correctly understood the frame of mind of the deceased. The learned judge, therefore, continued the examination, and at some point the district attorney apparently aided in its progress, until the witness had disclosed, not a selected part, but the whole of what deceased said to her during the last two days of his life. Near its close Hannon spoke of the influence of Sweeney with the police. The

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prisoner's counsel asked the court, "will you admit this?" to which the judge replied: "I have not admitted anything yet; I want to hear the whole statement made by the deceased before I determine whether I will or will not allow the alleged dying declaration in evidence." Nothing could be plainer or more direct than this. All that had been said by the witness was thus again declared to be purely tentative and preliminary, not yet evidence in the case and wholly directed to the enlightenment of the court in the performance of its duty. The statement, thus interrupted, was thereupon finished in a single sentence more of about half a dozen lines. So far, no evidence of Hannon's declarations had been admitted at all. They had been repeated for the information of the court to enable it to perform the duty of ruling whether any, and if so, what portion of them were competent evidence to be submitted to the jury. Until some such ruling was made there could be nothing to which the prisoner could except as constituting legal error. What followed was in some respects out of regular order. The district attorney, dropping the entire subject of the conversations with the deceased, proceeded to examine her, not upon the preliminary issue, but upon matters relating to the main issue and belonging to the consideration of the jury. It would have been more regular to have first finished the preliminary issue. The prisoner's counsel, however, seems to have acquiesced. He had been told that he could cross-examine upon the preliminary issue when the prosecutor had finished. That time had come, and he was at liberty, if he cared for the order of the proceeding, to interpose and assert the right which the court had promised to give him, and ask a decision of the preliminary issue before the trial proper was resumed. He did not do so. He chose to sit silent while the added proof, competent upon the main issue, was being submitted to the jury. When the district attorney closed his examination of the witness the prisoner's counsel asked three not very important questions, and then, turning to the court, said: "I move now to strike out all the evidence given by the witness, in regard to the interview with the deceased, upon the ground that it is inadmissible, for the reason that the necessary foundation has not been laid for

such declarations." This motion was singularly inapt, except for one purpose. As no declarations had yet been received in evidence, there were none to strike out, and the objection was to the whole of them, when some were beyond doubt admissible. If the purpose was to draw from the court an admission that they had been received, or an assent to such a claim, that purpose failed, for the court said in answer to the motion: "As I understand the position of the matter now, it is this: Mr. O'Bryne claims the right to cross-examine the witness, in reference to *what will be claimed by the district attorney* as evidence of dying declarations, for the purpose of ascertaining whether it is admissible. Are you cross-examining on that point?" The prisoner's counsel replied: "I am not; I am in a general cross-examination." The answer suggested to the judge the possibility of some confusion, for he at once said: "You may enter on the record that the court will now permit the defendant's counsel to cross-examine the witness before passing upon the question of the admissibility of the alleged dying declarations made by the deceased to the witness, as testified to by her." To this the prisoner's counsel said: "We cannot be estopped by any such record as that; it is a monstrous proposition." Why that should have been said, after what had occurred, it is difficult to say. We do not mean to criticise the counsel, who bore the heavy responsibility of his client's life, or misinterpret his zeal, but at least we differ from him entirely. We see in the action of the trial court, a steady purpose to keep the evidence of declarations out of the case until, at a proper and suitable time, it should be determined, what, if any, were admissible. The counter-effort seemed to be to insist that the court stood in the position of having admitted in evidence what it is clear was never admitted at all. The cross-examination then proceeded. Before it closed it reverted to the declarations of the deceased, which had been repeated to the court. The witness was asked if she recollected the interview clearly; if she thought her son was dying, why she did not send for a priest on Wednesday; what was the subject matter of deceased's conversation on Thursday, and what was the whole conversation between them. As the witness began to repeat it the counsel suddenly closed his cross-examination. The

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court then asked if it was finished, and receiving an affirmative answer, proceeded to determine the preliminary issue and decide what portion of the statement of the witness to the court should be admitted, and directed the stenographer to read to the jury, and he did read to them "so much and such parts thereof as are embraced within black lines," and marked on the margin, "allowed to stand as evidence of dying declarations," and ordered the balance to be "stricken from the evidence," and in view of what had occurred took the added pains to caution the jury to disregard what they had heard repeated but what the court decided it would not admit. Upon this state of facts I cannot resist the conviction that the declarations of Hannon, now objected to, were never admitted in evidence, but wholly excluded; and that the case is not at all one in which erroneous proof was first admitted and then sought to be stricken out, but one in which no error of admission existed which required correction. It seems sufficiently evident also that any doubt on the subject and any confusion or mistake as to what was being done, was steadily and persistently guarded against by the court, and the admissibility of the proposed evidence determined as soon as it could be done consistently with the right of cross-examination reserved to the defense.

Since there could be no valid exception to the admission of evidence which was never admitted, the only possible inquiry becomes whether the action of the court in acquiring the needed information on which to rule is itself the subject of our review. We do not see how it can be. It rests in the judicial discretion. It never goes to the jury except so far as admitted. Some means of information the court must have. The suggestion made is "that it should have confined the preliminary examination to the facts relating to the declarant's condition of body and mind at the time." That proposition, stated as a general guidance of trial judges in exercising their discretion, need not be doubted; but the inquiry will remain in each case, under its own peculiar circumstances, how far the examination should extend in order to ascertain with accuracy and reasonable certainty the mental condition and belief of the declarant. The exercise of that discretion was reviewable by the General Term, but is beyond our

jurisdiction, unless we can see that such discretion was abused, and the action of the court arbitrary and without reason. We cannot say that. There was a motive which might fairly have operated upon the judicial mind to push the inquiry beyond the point at which the district attorney paused, and that motive was, as we have already suggested, to ascertain whether the assurance of survival, which the deceased had been told the doctors had given, became at any time so operative upon him as to awaken a hope of life. With that circumstance before it, the court might reasonably conclude that a part of what was said would scarcely furnish as safe a basis of judgment as the whole. We can readily see that the determination of the court to hear all that the deceased said before deciding whether any of it was admissible, should not be deemed arbitrary or an abuse of discretion under the existing facts. Suppose that it had turned out, as from what appeared seemed quite possible, that the very last thing said by Hannon, relating not at all to the facts of the shooting, had shown the presence of a lurking but confident hope of recovery. Singularly enough, the prisoner's counsel illustrates the force of what we are saying by claiming in his able brief precisely such a result. He plants himself upon the very last words of Hannon, which closed the conversation with his mother, and which were about Sweeney and the police, and argues that they show a hope of recovery. Hannon said, "I am afraid, mother, you will get no satisfaction for your son." She replied, "Johnnie, that can't be so." He answered, "I hope so, mother, because I would like to go agin them fellows." The counsel claims that the expression does bear somewhat upon Hannon's frame of mind, and yet, without what preceded it, its occasion and even its accurate meaning might be lost to us. It does not appear to have been deemed sufficiently material by the learned trial judge to have affected his judgment, but he could not have known that in advance; and it is easy to see that it might have assumed a form which would have been very material. The hope of survival, the lingering belief that death is not inevitable, may disclose itself to an observant mind where even the witness does not see it, and may come to the surface when the talk is far away from the facts of the killing, and from

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the *res gestae*. These suggestions show that the action of the court was, at least, not arbitrary and without some apparent reason, and so its discretion was not abused. The General Term, which had the power to review it, has held that the rights of the prisoner were not prejudiced, and its conclusion must, therefore, prevail.

The judgment should be affirmed.

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LANGLEY v. WADSWORTH.

New York Court of Appeals, 1885.

[Reported in 99 N. Y., 61.]

It is not error to refuse to direct a verdict, unless the request sufficiently indicates the ground to call the attention of the court to it specifically. Cross-examination as to facts in issue or facts relevant to the issue, is matter of right.

Cross-examination to ascertain the accuracy or credibility of a witness is subject to the discretion of the trial judge in respect both to method and duration.

Cross-examination as to a fact which, if admitted, would be collateral and wholly irrelevant to the matter in issue and in no way affect the credit of the witness, is not allowable.

Action upon a promissory note for \$4,000, alleged to have been made by the defendant's testator, John B. Wadsworth, deceased, and payable to the order of plaintiff.

The answer admitted the death of John B. Wadsworth and the appointment of defendant as his executor, and then followed with a general denial, and defendant's counsel claimed that it thus put in issue the consideration as well as the execution of the note.

Upon the trial, after plaintiff had rested, defendant introduced in evidence, letters written by the plaintiff to John B. Wadsworth, the alleged maker.

Mr. Noltin, an expert on handwriting, was called by plaintiff, and gave his opinion that the signature to the note was genuine. On cross-examination he said he could see very great dissimilarity between it and other signatures assumed to be genuine, which he could only account for by the fact that the writer was in ill health. The defendant's counsel then put a hypothetical question which assumed that shortly before the time when, as plaintiff claimed, the testator executed the note, he walked from a Jersey City ferry to the Grand Central Hotel, carrying quite a large satchel; upon that hypothesis the witness was asked what he would say as to the testator being in such a condition as not to be able to write his name. The question was objected to as incompetent, and excluded. A second question "Assuming that the man had simply

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the asthma, or a difficulty of breathing, do you think that would account for the difference in his signature," was likewise excluded.

At the close of the case, defendant's counsel asked the court to direct a verdict for the defendant, in view of the letters of the plaintiff.

Motion denied and exception taken.

The jury rendered a verdict for the plaintiff.

Special Term denied motion for a new trial.

The Supreme Court at General Term affirmed the order and judgment.

SMITH, P. J. [*as to witness Nolton, said*]: The hypothesis submitted to the witness furnished no facts upon which an opinion could properly be based as to the testator's ability to write, and the question what effect the physical exertion supposed would have had upon the testator's handwriting, or what it indicated as to his ability, if proper for an expert, was one for a medical expert, rather than an expert in handwriting. As the witness was not shown to be a medical expert, his answer to the question would have been of no value as testimony.

The Court of Appeals affirmed the judgment.

DANFORTH, J.: The complaint stated a good cause of action in favor of a payee and holder against the maker of a promissory note. The answer was a general denial. Upon the trial it was assumed by both parties that the plaintiff, when she rested, had given evidence, which, unless disproved, would justify a verdict in her favor, and the defendant took the burden.

With other evidence he introduced letters written by the plaintiff to the testator—the alleged maker of the note—and at the close of the case asked the court "to direct a verdict for the defendant in view of these letters." The court declined to do so, and the exception then taken is now placed upon the ground "that they showed the note to be without consideration." If so, and the defendant relied upon that fact, the attention of the court should have been called to it. (*Thayer v. March*, 75 N. Y., 340.) Had it been,

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other evidence might have been permitted from the plaintiff. She was not called upon to give it in the first instance. The form of the note, its possession, and proof of genuineness, made for her a *prima facie* right of action.

But we think it quite apparent that the letters referred to were not introduced for the purpose contended for, but rather to show that the note was in fact spurious. We see from the record that all the evidence was directed to that issue.

But, however that may be, we find nothing in the letters themselves, nor in the argument of the learned counsel for the appellant, which would require a trial court to dispose of it as matter of law. The question was for the jury, and was submitted to them in a manner satisfactory to the defendant. Their verdict has been approved by the trial judge and by the General Term. We think the exception was not well taken.

Nor do we find any error in regard to evidence. So far as the cross-examination of a witness relates either to facts in issue or relevant facts, it may be pursued by counsel as matter of right; but when its object is to ascertain the accuracy or credibility of a witness, its method and duration are subject to the discretion of the trial judge, and unless abused, its exercise is not the subject of review; nor can the witness be cross-examined as to any facts, which, if admitted, would be collateral and wholly irrelevant to the matter in issue, and which would in no way affect his credit. The exception presented comes within one or both of the last two conditions. The issue was upon handwriting. The witness Nolton, as an expert, had testified to his belief in its genuineness. It was not suggested that he lacked skill or experience in that matter, nor that both were not sufficient to entitle him to be considered an expert. He had testified that it was represented to him that the party was ill when it (the note) was written, and that he examined the signature upon that hypothesis. His attention was called to two signatures, and he said: "I accounted for the differences in the two by the fact that the man was not in good health." One signature was on the note in suit, the other on a check, and on cross-examination concerning the latter, he says: "I find no evidence of tremulousness," and as to the other, he saw "a great dissimilarity," adding, "can only

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account for it by the health of the man," speaking of it, not as a fact perceived by or known to him, but obviously as on his direct examination—of something represented to him.

Then came questions which were excluded. By the first, witness was in substance told to assume that the alleged writer did, just about the time of the supposed writing, take a certain described walk, "carrying quite a large satchel," and was then asked: "What do you say about his being in such a condition as not to be able to write his name?" and by the second to assume that "the man had simply the asthma or a difficulty of breathing, and declare whether that would account for the difference in his signature."

The first question suggests no fact on which an opinion upon any issue before the court could properly be based, but if it did, it was for the jury and not the witness, who had no better or other information concerning its effect than they had, and the second involved an inquiry disconnected from any matter to which the witness had spoken. He had attributed no disease to the writer—did not pretend to have known or ever to have seen him, but had acted upon the representation that he was ill; and while it is possible to imagine that the scheme of cross-examination was so extensive as to embrace every known disorder, the witness had asserted no skill as to any, but only knowledge common to every one—that illness does sometimes so affect the nerves and muscles of a man as to diminish his strength and induce tremulousness. He spoke of this condition as concomitant with illness, and not as an effect of any particular disease. It would have been pertinent to ask by whom the representation on which the witness relied was made, or what opportunity he had of seeing signatures written under such supposed condition. The questions asked were pointless. The facts to which they were directed were irrelevant to the matter in issue, and, however answered, would not have affected the credit due the witness. No other point is made, and we think the appeal fails.

All the judges concurred, except ANDREWS, J., absent. Judgment affirmed.

Winner *v.* Lathorp, 67 Hun, 511.

WINNER *v.* LATHORP.*New York Supreme Court, 1893.*

[Reported in 67 Hun, 511.]

If one party exhibits to the jury a thing, such as the broken arm in a negligence case, as evidence, the other has a right to have an expert inspect it, and to have the expert testify as a witness; and it seems, if it be the case of an injury to the person, to cross-examine the party.

Ida O. Winner sued for damages claimed to have been sustained by reason of the alleged unskillfulness or negligence of the defendant, a surgeon, in reducing a fracture of the plaintiff's arm or wrist.

Upon the trial, plaintiff was called as a witness in her own behalf, and testified generally as to the accident, her visit to the defendant's office, and his mode of treatment.

She further testified: "I cannot move my fingers, nor move my arm in this rotary motion."

While describing the condition of her wrist, the witness, at the direction of her counsel, rolled up her dress sleeve, removed a small bandage, and exhibited her arm and wrist to the court and jury.

After plaintiff had rested, defendant's counsel asked that Mrs. Winner allow Dr. Lathorp to examine her wrist.

Plaintiff's counsel objected.

The court held it had no power to direct such an examination; defendant excepted; defendant's counsel asked that so much of Mrs. Winner's testimony as relates to the present condition of the wrist be stricken out on the ground that she refused to permit an examination by defendant.

Motion denied and exception taken.

Dr. Lathorp, the defendant, was then called as a witness in his own behalf, and testified as to instruction given plaintiff for the treatment of the wrist, and further: "was present in court when she was examined as a witness. Could not tell from where I sat what the condition of her wrist now is. I could by feeling of it, I think. I am willing to make an examination of it."

Winner v. Lathorp, 67 Hun, 511.

Defendant's counsel here asked the court to allow the witness to look at the plaintiff's wrist and examine it with a view of testifying to its present condition.

Plaintiff's counsel objected.

The court sustained the objection on the ground that it had not the power to direct such examination. Defendant excepted.

The County Court entered judgment for plaintiff.

The Supreme Court at General Term reversed the judgment.

MAYHAM, P. J. [*after stating facts*], said: It is quite true, as contended by the learned counsel for the respondent, that the court has no power to compel an injured party in a case like this to exhibit her injury to the defendant before trial for inspection, for the purpose of furnishing evidence for the defendant.

In *McQuigan v. The Delaware and Lackawanna Railroad Company*, 129 N. Y., 50, the Court of Appeals held that the court had no power to compel a party, in advance of a trial for physical injury, to submit to a surgical examination on the application of the adverse party.

But Judge Andrews, in his opinion, states that: "The sole question presented by this record is whether the Supreme Court has power in advance of the trial of an action for personal and physical injury, to compel the plaintiff, on application made in behalf of the defendant, to submit to a surgical examination;" Any discussion beyond the examination of that precise question in that case would be irrelevant and obiter, and would not, therefore, be authority in a case where, on the trial, the injured party had voluntarily exhibited the injured part to the jury.

The same doctrine was held by the General Term in *Roberts v. Ogdensburgh, etc., Railroad Company* (29 Hun, 158) where an order of a Special Term granting such examination before trial was reversed. In this case as in the case of *McQuigan v. Railroad Company* (*supra*), all that the court was called upon to decide was as to the power of the court to compel an examination before trial.

In *McSwyny v. Broadway and Seventh Avenue* (7 N. Y. Supp., 459), it was held that a plaintiff might properly refuse to submit to a personal inspection of the alleged injury on the

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application of the defendant at the trial. But the plaintiff had not in that case voluntarily exhibited the injured part to the jury as done in this. I have been referred to no case nor have I been able to find any in which a party claiming a physical injury has first voluntarily submitted the injured part to the inspection of the jury as evidence, and has refused to permit the adverse party to follow up that examination in the presence of the jury by a personal or professional inspection of such injured part.

Such an examination seems to me to stand upon a different principle from that of a compulsory examination by the adverse party before or at the trial when the injured party has not made *proof* of the injured part.

It seems to me that it would be unfair and might result in a gross injustice to the party against whom such evidence was used. In such a case it would be in the power of the party by muscular distortion of the injured part, especially an arm or hand, to impose upon the jury and court, as well as the adverse party, and produce upon the mind of the jury a false impression as to the extent of the injury.

The member having been put in evidence as a part of the direct examination, it is, for the purposes of the trial, made the property of the court and opposite party for the purpose of a cross-examination. It is difficult to conceive of a species of evidence that is offered by one party in support of his case which may not, in the presence of the same tribunal, be examined and criticised by the party against whom it is offered. We think, therefore, that the inspection and examination of this limb should have been ordered and permitted by the court, and, in case of refusal to submit to such inspection by the plaintiff, her evidence, so far as that exhibit and explanation of the same by the plaintiff was concerned, should have been stricken out on defendant's motion.

The plaintiff had a right to exhibit this injured limb to the jury, and the defendant had no power to exclude it (*Hiller v. The Village of Sharon Springs*, 28 Hun, 344).

In this case LEARNED, P. J., says: "But if the plaintiff's leg was injured, there was no more certain and unquestionable way of proving that fact to a jury than by showing them the leg itself."

Burden v. Pratt, 1 Supm. Ct. [T. & C.], 554.

In *Mulhado v. Brooklyn City Railroad Company* (30 N. Y., 370), the court speaking upon this subject, say: "Such exhibition certainly tended to make the description of the injury more intelligible."

If the party injured can offer this evidence, most certainly the adverse party should be permitted to cross-examine and criticise such evidence.

For both the grounds above discussed we think that this judgment and order should be reversed.

HERRICK, J., concurred; PUTNAM, J., concurred in the result.

Judgment and order reversed and a new trial granted, costs to abide the event.

BURDEN v. PRATT.

New York Supreme Court, 1873.

[Reported in 1 Supm. Ct. [T. & C.], 554.]

The non-appearance of a witness, who has been cross-examined, for further cross-examination on a subsequent day, is not necessarily ground for striking out his testimony, unless chargeable to the misconduct or neglect of the party calling him.

An action for breach of warranty on the sale of a horse.

On the trial in the County Court the plaintiff called one Somers as a witness. He was examined and was cross-examined by defendant's counsel. When the cross-examination closed, defendant's counsel stated in open court, in the hearing of plaintiff's attorney and the witness, that he desired the witness to be present on the morrow, as he desired to further cross-examine him. Other witnesses were then called and the trial proceeded.

On the next day the court, at the request of defendant's counsel, directed the clerk to call Somers for further cross-examination. He was called but did not answer.

The defendant's counsel told the court that the witness had been told he (the counsel) should want to cross-examine him, and that he had told the witness that morning, before the opening of

Burden v. Pratt, 1 Supm. Ct. [T. & C.], 554.

the court, that he should expect him in court, as he desired to cross-examine him further.

The defendant's counsel then moved to strike out the direct examination of the witness, as he had notified the plaintiff's counsel and the witness that he desired to further cross-examine him, and the plaintiff's counsel had failed to produce him. The court denied the motion and the defendant's counsel excepted.

The Justice's Court entered judgment for the plaintiff.

The County Court affirmed the judgment.

The Supreme Court at General Term affirmed the judgment.

MULLIN, P. J. [*after stating facts*], said: The party producing a witness and examining him must have him in court to be cross-examined, and if he does not the direct examination will be stricken out.

If, however, the party desiring to cross-examine does so, and he is not prevented by the plaintiff, or by the adjournment of the court from completing it, it is his duty to complete it; and if he defers it to another day, for his own convenience, the opposite party is not obliged to detain the witness, and, if the latter absents himself, it is not the fault of the party calling him.

In this case it would seem that the defendant voluntarily suspended the examination till the next day, the trial continuing in the mean time. Notice to the plaintiff's counsel and the witness that he intended to resume the cross-examination at a future time imposed no duty upon the plaintiff or the witness. If defendants could compel the party to keep his witnesses for one day, he could for ten days, if the trial should continue so long. No such burthen can be imposed on one party by another for his own convenience.*

The cases of *Cole v. The People*, 2 Lans., 370; *Sheffield v. R. & S. R.R. Co.*, 21 Barb., 339; *Forrest v. Kissam*, 7 Hill, 463, do not sustain any such practice.

To entitle the party to have evidence on direct examination

* Compare *Neil v. Thorne*, p. 600 of this volume.

People v. Severance, 67 Hun, 182.

stricken out, because the witness does not appear to be cross-examined, the loss must be chargeable in some way to the misconduct or neglect of the party calling him, unless it is the other party is not entitled to relief.

PEOPLE v. SEVERANCE.

New York Supreme Court, 1893.

[Reported in 67 Hun, 182.]

If, after cross-examination, a witness is allowed to leave the stand and the courtroom, without the attention of the court being called to the fact that the cross-examining counsel wishes to cross-examine him further, it may be error to refuse to give a brief adjournment to enable the cross-examining counsel to secure the attendance of the witness.

Indictment for feloniously making a false entry in a book of accounts kept by a corporation, while being an officer of such corporation, with an intent to defraud.

Upon the trial, Oscar F. Richardson, the bank examiner who examined the Bank of Fayetteville, was called and examined as a witness for the People, and cross-examined by defendant and then left the stand, and other witnesses were called and examined.

Several days afterward, when the prosecution were about to rest their case, defendant's counsel stated that before the prosecution rested, he wished to ask more questions of the bank examiner.

The bank examiner had left the court the previous day, after his examination; the defense claimed, and the prosecution denied, that notice of a wish to further cross-examine had been given.

The court said that, the witness not being present and there being no information that he was still in town, the court had no recourse but to proceed with the cause.

The defendant's counsel thereupon moved to strike out the testimony of the witness for not having been accorded the right to further cross-examine him.

People v. Severance, 67 Hun, 182.

The court said: "The witness is not here and is not available so far as I can learn. He is bound to stay until he is examined and cross-examined, and then if counsel desire him to remain they should ask the court to direct him to remain. Well, the People rest; what do you desire?"

Defendant's counsel asked and obtained leave to file affidavits as to the facts, and the prosecution did the same, that the claim of each side might appear on the record.

The court said: "No suggestion has been made to the court that the cross-examination was not completed. The witness has answered the subpoena and subjected himself to examination on both sides fully, and has gone away without either any direction or consent either way of the court, and now to strike out his evidence because the defendant desires further to cross-examine him under those circumstances would be, in my judgment, a gross perversion of the rule, and that application is denied."

The Court of Sessions of Onondaga County convicted defendant.

The Supreme Court at General Term reversed the judgment.

MARTIN, J. [*on this point said*]: Oscar F. Richardson, the bank examiner, who examined the Bank of Fayetteville, was called as a witness by the People early in the trial of the case. He was examined by the People, and cross-examined by the defendant, and left the stand. Afterwards and during the trial the defendant's counsel desired to further cross-examine him, but he was not in court, having that morning, or the previous night, returned to his home in the city of Brooklyn. The defendant claims, and has introduced affidavits to show that, at the conclusion of his examination, the defendant's counsel stated to the district attorney, in the presence of the court, that he desired to further cross-examine this witness, and desired him to remain in attendance for that purpose. The district attorney and others made affidavits that they heard no such request or notice from any source. The witness was in the city of Syracuse the night before he was called for further cross-examination, and the defendant's attorney had reason to believe

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that he would be present when required, as one of the defendant's attorneys informed the witness the night before, that they desired to recall him for further cross-examination. The court refused either to delay the trial to enable the defendant to procure the attendance of the witness, or to strike out the evidence that he had already given, on the ground that the defendant had not been permitted to fully cross-examine him. The defendant contends that this was error, and that the court should either have given him an opportunity to procure the attendance of the witness, or have stricken out the evidence he had already given.

It was said by FOLGER, J., in *Sturm v. Atlantic Mutual Insurance Company* (63 N. Y., 87): "It may be taken as a rule that, where a party is deprived of the benefit of the cross-examination of a witness by the act of the opposite party, or by the refusal to testify, or other misconduct of the witness, or by any means other than the act of God, the act of the party himself, or some cause to which he assented, that the testimony given on the examination in chief may not be read."

It was held in *People v. Cole* (43 N. Y., 508), that it was error to suffer to go to the jury any evidence given by a witness on direct examination by the people where, by sudden illness, or by the death of such witness, or other cause, without the fault of and beyond the control of the prisoner, he is deprived of his right of cross-examination.

In *Sheffield v. Rensselaer and Saratoga Railroad Company* (21 Barb., 339), where, on the trial, the plaintiff's counsel, before dismissing the witness from the stand, inquired of the defendant's counsel whether any of the facts testified to by the witness would be controverted, to which the defendant's counsel replied that they should introduce no evidence on the points testified to by him, and the right of cross-examination was not reserved, but at the close of the trial the defendant's counsel called the witness for further examination and he did not appear, having gone home, it was held that, under these circumstances, the plaintiffs were under no obligation to detain the witness for the purpose of further examination by the defendant's counsel. In that case the court said: "We are not called upon to decide whether in every case where a party introduces and examines a witness

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he is bound, at the peril of losing his evidence, to keep him in court until the trial is closed for the benefit of the adverse party. We incline to think the counsel should avail themselves of the opportunity to cross-examine before the witness leaves the stand, unless the court for some good reason should allow them the privilege at a subsequent stage of the trial. In this case the plaintiff's counsel had good reason to suppose the witness would not be wanted further by the defendant."

In *Ruloff's* case (11 Abb. [N. S.], 245), it was held by the trial judge that, where witnesses have once been cross-examined, and have left the stand, without reason to expect to be called again, the fact that they do not appear when called again to be further cross-examined, as to a fact on which they were not previously examined, is not, necessarily, ground for striking out their testimony, especially where other evidence has already been given of the fact sought to be proved.

In *Burden v. Pratt* (1 T. & C., 554), where a witness for the plaintiff was examined and cross-examined, and at the close of the cross-examination the defendant's attorney gave notice to the witness and plaintiff's attorney that he wished to further cross-examine the next day and desired the witness present at that time, and the trial continued and other witnesses were examined, it was held that the plaintiff was not bound to produce the witness on the following day for further cross-examination.

"The court may, in all cases, permit a witness to be recalled, either for further examination in chief, or for further cross-examination." (Reynold's *Stephen on Evidence*, 178.)

While the authorities upon this question are not in entire harmony, and some of them would seem to justify the rulings of the court in this case, yet, we are disposed to think the court should have permitted the defendant to secure the attendance of this witness, and held the trial open a reasonable length of time to enable him to do so. It can be readily seen by an examination of the case how a further cross-examination of this witness might have been important to the defendant after the introduction of the other evidence given by the People. That the defendant intended to reserve the right of further cross-examination and to give the People's attorneys notice of that fact, we have no

Notes of Recent Cases on the Right of Cross-examination.

doubt. The affidavits of four witnesses are to the effect that such statement was made by the defendant's counsel, while the affidavits in opposition are only to the effect that no such notice was heard, although at the trial one of the affiants simply stated that he did not remember that any such statement was made by the defendant's attorney. Under these circumstances, we think the proper administration of justice would have been better served by permitting the defendant to secure the attendance of this witness, even if a brief postponement of the trial, until his attendance could be secured, had been necessary. (*Neil v. Thorn*, 88 N. Y., 270, 276.)

There are other grave exceptions in the case, but, as we think, the judgment should be reversed for the errors already pointed out, and as those raised by the other exceptions will probably be avoided upon a second trial, we do not deem it necessary to specially consider them on this appeal.

The conviction, judgment and order must be reversed and a new trial ordered, and the clerk of Onondaga county directed to enter judgment and remit certified copy thereof, with the return and decision of this court to the Court of Sessions of Onondaga county, pursuant to sections 547 and 548 of the Code of Criminal Procedure.

HARDIN, P. J., concurred ; MERWIN, J., concurred in result.

NOTES OF RECENT CASES ON THE RIGHT OF CROSS-EXAMINATION.

Georgia: *Woolfolk v. State*, 85 Ga., 69; s. c. 11 Southeast. Rep., 814 (while a party has a right to thoroughly cross-examine a witness called against him, this right must end some time and it is within the discretion of the trial court to place a reasonable limit thereto); s. p. *Hamilton v. Miller*, 46 Kan., 486; s. c. 26 Pacific Rep., 1030. *Illinois*: *Truesdale Manufg. Co. v. Hoyle*, 39 Ill. App., 532 (cross-examination which calls for argumentative replies is not permissible). *Indiana*: *Apple v. Board of Commissioners of Marion County*, 127 Ind., 553; s. c. 27 Northeast. Rep., 166 (cross-examination may be allowed as to voluntary statements of a witness on direct which has been allowed to stand by the party calling the witness). *Pennsylvania Co. v. Newmeyer*, 129 Ind., 401; s. c. 28 Northeast. Rep., 860 (questions assuming facts are improper even on cross-examination). *Foss-Schneider Brewing Co. v. McLaughlin*, 5 Ind.

Notes of Recent Cases on the Right of Cross-examination.

App., 415; s. c. 31 Northeast. Rep., 838 (an error in permitting cross-examination as to a writing not in evidence is cured by subsequently putting the writing in evidence). *Maryland*: Scott v. McCann, 76 Md., 47; s. c. 24 Atlantic Rep., 536 (it seems to be admissible, in equity at least, to receive the testimony of a witness whose cross-examination has been prevented without fault of the witness or party producing him, or has been cut off by the witness's death). *Michigan*: Beers v. Payment, 95 Mich., 261; s. c. 54 Northwest. Rep., 886 (where there is no abuse of the privilege nor any attempt to consume the time of the court with fruitless cross-examination, it is proper cross-examination to ask a witness to repeat what he has testified on a particular point on his direct examination; and it is not a sufficient reason to refuse to allow cross-examination respecting what he has testified to, that he has already testified upon the subject upon his direct examination); s. p. Zucker v. Karpeles, 88 Mich., 413; s. c. 50 Northwest. Rep., 373. *Minnesota*: O'Riley v. Clampet, 1893, 55 Southwest. Rep., 740 (it is proper not to permit a witness to be cross-examined as to the contents of a written instrument not in evidence; if the cross-examining party desires to examine as to such an instrument he may introduce it in evidence as a part of the cross-examination if its execution is admitted). *Hamilton v. Hulett*, 1893, 53 *id.*, 364 (the trial court may in its discretion refuse to allow cross-examination to be unreasonably extended). *Missouri*: State v. Duncan, 1893, 22 Southwest. Rep., 699 (where a witness on cross-examination evades legitimate questions, the adverse counsel should not be permitted to interpose frivolous objections to rapid cross-examination, thereby affording the witness an opportunity to fabricate; and where a witness evades replies to proper questions he may be pressed for answers). *Nebraska*: Jones v. Stevens, 36 Neb., 849; s. c. 55 Northwest. Rep., 251 (it is not error to prohibit the repetition of a question which has already been three times asked, under the penalty of forbidding further cross-examination). *New York*: Cornwell v. Cogwin, 17 N. Y. Supp., 299; s. c. 44 State Rep., 12 (questions on cross-examination which assume facts not in evidence are properly excluded).

To test memory—State v. Duffy, 57 Conn., 525; s. c. 18 Atlantic Rep., 791 (it is not error to allow cross-examination as to matters not in issue for the purpose of testing the witness's recollection; such examination is largely within the discretion of the trial court). *Davis v. California Powder Works*, 84 Cal., 617, s. c. 24 Pacific Rep., 387 (a witness, who testified in chief as to the date he signed a lost grant, was allowed to be cross-examined as to other grants made by him about the same time in order to test his memory). *State v. Ellwood*, 17 R. I., 763; s. c. 24 Atlantic Rep., 782 (where a jeweler as a witness was called to identify a stolen watch, it was held not within the latitude of cross-examination for the purpose of testing his memory to inquire into his private affairs by asking him how much business approximately he did in a certain year).

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NEIL v. THORN.

New York Court of Appeals, 1882.

[Reported in 88 N. Y., 270.]

In an action for malicious prosecution and false imprisonment, evidence that the complaint made by the defendants to the magistrate differed from that stated in the written complaint drawn up by the magistrate, and that he advised them to make the charge in the form in which he drew it up, is competent, if foundation is laid for it in the answer, as tending to disprove malice.

A defendant has no right to introduce his case by cross-examining the witness of the plaintiff; whether this should be done is in the discretion of the trial judge.

Thus in an action for malicious prosecution and false imprisonment, plaintiff's counsel having called the magistrate and interrogated him so far as to prove that he issued the warrant on a complaint signed by one of the defendants after statements to him by all of the defendants, defendants' counsel cannot, as matter of strict cross-examination, call for the particulars of the statement for the purpose of showing, to disprove malice, that it stated a different charge from that which the magistrate put into the complaint.

Error in excluding relevant evidence is cured if the party excepting to its exclusion subsequently offers, and is allowed to prove the matter which had been erroneously excluded.

If he was prejudiced by not being allowed to prove it by the witness who was under cross-examination, he should ask to have that witness again brought in. The appellate court will not presume that the witness had left the court without consent of the cross-examining counsel or permission of the court.

Action for malicious prosecution and false imprisonment. The complaint alleged that the defendants caused plaintiff to be brought before a justice of the peace without probable cause, on a charge of obtaining by false pretenses the signature of one of the defendants to a writing, by which, with intent to cheat and defraud, plaintiff procured money from a third person.

The defendants' answer stated that they were trustees of a school district and the plaintiff a teacher who, on being dismissed, carried away the school register and the school house door key, and refused to return them, and that he also by promising to get the signature of the other trustees, obtained the signature of one of them to an order for money to be paid him by the collector, and obtained payment without such other signatures,

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on a promise to get them, which he did not fulfil; and that on stating the facts to the justice, the justice advised the issue of the warrant in the form in which it was issued, and proved unsustainable.

Upon the trial, the magistrate was called as a witness for the plaintiff and identified the complaint for false pretenses (which was signed, however, by only one of the defendants, viz. Ferris), as the one on which he issued the warrant of arrest. In answer to inquiries by plaintiff's counsel, the witness testified that first the other two trustees came before him, and at a second interview all three came. At each interview some statement was made about this charge. Witness did not know, he said, at whose request he issued the warrant, but he issued it on the complaint signed only by Ferris.

At the very beginning of the cross-examination, being asked "when these trustees first came there" (i. e., before him as magistrate), "did they make this complaint," he said: "Do you mean the two, or three trustees?" And defendant's counsel replied, "well, the two, first." The witness then said, "I think they came to make a different complaint first." Counsel: "A different complaint, please state what that was?" To this inquiry the plaintiff objected as immaterial. The objection was sustained, and the defendants excepted. Their counsel then said: "We offer to prove, by this witness, that the defendants first went there for the purpose of making complaint before him (that is, the witness), to procure from the plaintiff the key and register of this district." The objection was repeated and was followed by the same ruling. The defendants' counsel continued, "and that, after having told their object, including the transaction with reference to this order, this witness advised them to take this proceeding, and that Mr. Ferris (one of the defendants), in pursuance of that advice, made that complaint." This was also objected to with like result.

At Circuit, plaintiff recovered judgment.

The General Term of the Supreme Court reversed it without discussing these questions of evidence.

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The Court of Appeals reversed the judgment of the General Term, and affirmed judgment upon the verdict.

DANFORTH, J. [*after stating the facts, said upon these questions*]: It is now argued by the learned counsel for the defendants (respondents here), that "the testimony was material upon the question of malice, as tending to prove a claim of the defendants that they applied to the justice for process to obtain the key and register from the plaintiff, and that the justice advised instead the proceeding upon which the warrant in question was issued;" and again, "that it was competent, if for no other reason, for the purpose of disproving malice." It was no doubt obvious on the trial that this was the object of the testimony called for, and it must have been so understood by the judge.

In view of the proceedings upon the trial, it may be conceded that this position is well taken, for the trial judge charged the jury in accordance therewith. He said: "If you find that these trustees went to the magistrate and told him their story, and stated to him the facts of the case, and that he advised them to procure this warrant, then I charge you that you have the right to take that circumstance into consideration in mitigating the damages."

It does not follow, however, that the exception should prevail.

First. The offer was of new matter. If true, it would, to some extent, perhaps, support the allegations in the answer; but it was not called forth by any part of the direct examination of the witness, and was in violation of the general rule that a party cannot introduce his case to the jury by cross-examining the witness of his adversary. (*Hartness v. Boyd*, 5 Wend., 563; *Kerker v. Carter*, 1 Hill, 101.) It was, therefore, in the discretion of the trial judge to admit or exclude it at that time. The orderly conduct of the trial might, in his opinion, require that the evidence for the plaintiff should be first concluded before the defence was introduced, or matter in support of the defence. His decision, if made on that ground, could not be reviewed. (*Bedell v. Powell*, 13 Barb., 183; *Allen v. Bodine*, 6 *id.*, 383; *Fry v. Bennet*, 3 Bosw., 200; 4 Denio, *infra*.)

Second. This ruling, if erroneous, was cured by subsequently

admitting the same evidence at the instance of the defendants. It should be noticed that the objection was general, and, therefore, related, not to the competency of the witness, but to the relevancy of the testimony. (*Stevens v. Brennan*, 79 N. Y., 254.) The defendants did not adhere to the exception, but when the case came to them, made the same offer and the evidence was received. They proved the facts embodied in their offer by several witnesses, but did not again call Turk. I think this was a waiver of the exception on the part of the defendants, acquiesced in by the trial judge, and, therefore, not available here.

It is said that it does not appear that Turk was present when this evidence was given. If the defendants were prejudiced by the ruling, it was their duty so to present the case upon appeal that his absence and their inability to obtain him should be made apparent. A witness once summoned and called to testify upon a trial is presumed to be present until its conclusion. It is his duty to be in court, and without consent of the opposite party or permission of the court, he could not lawfully leave.* Had it appeared that the witness left the court and was not present when wanted, it would have been in the discretion of the judge to suspend the trial until he could be again brought in. (*Rapelye v. Prince*, 4 Hill, 119.) If that was refused, the defendants might perhaps have had the benefit of an exception. It is well settled that an erroneous ruling as to evidence may be corrected by the court. (*People v. Parish*, 4 Denio, 153); or an objection may be withdrawn by the adverse party. (*Ligget v. Bank of Pa.*, 7 S. & R., 218.)

In either of these cases it must indeed appear that the error was corrected under circumstances which worked no injury to the party excepting. But an exception may also be waived by the party taking it; he is not bound to stand by the exception. It may be waived expressly or by inference, and the implication of such waiver is unavoidable when he offers again proof of a fact excluded by a former ruling; for by his renewed application he elects to submit to the decision of the court. If that is in his favor, the former exception falls. He cannot retain the ex-

* Compare *Burden v. Pratt*, p. 592 of this vol.

Neil v. Thorn, 88 N. Y., 270.

ception and so allege error in law, after getting in such evidence as he offers, and try before the jury its effect upon the question of fact. He must be deemed to have made the new offer under circumstances satisfactory to himself, and is thus brought directly within the rule, that exclusion of evidence at any stage of the trial is no ground of exception if it is subsequently admitted. (*The Park Bank v. Tilton*, 15 Abb., Pr. 384; *Morgan v. Reid*, 7 *id.*, 215; *Jackson v. Parkhurst*, 4 Wend., 369; *Hay v. Douglas*, 8 Abb. Pr. [N. S.], 220; *Forrest v. Forrest*, 6 Duer, 102, 117.)

In the case last cited, a letter was offered in evidence by defendant, but rejected. It was afterward admitted and read in evidence by him. Upon appeal the defendant sought the benefit of his exception to the first ruling, but the court say: "There is nothing in this point, unless it be a sound rule of law that a ruling, rejecting evidence offered, erroneous at the time it was made, cannot be cured by admitting the same evidence at the instance of the party excepting in a subsequent stage of the trial. No authority has been cited to the effect that for such an error a new trial should be granted." "It is as if on exception to the refusal of the court to nonsuit, a defendant gives evidence, and after verdict for the plaintiff, alleges the exception as ground for a new trial. It is in such a case held that, by not standing on his exception, it is lost to the party taking it," and the court in the case cited (*Forrest v. Forrest*, *supra*), say: "It is difficult to state a principle which should exempt the omission to rely upon the exception in this case from the same consequences."

In *Robinson v. The Fitchburg & W. R. R. Co.* (7 Gray, 92), the plaintiff offered in evidence the admissions of the president of the defendant. They were excluded and exception taken; they were afterward admitted, and in reviewing the exception the court say: "The order of proof is always within the discretion of the judge presiding at the trial, and his exercise of this discretion is not open to exception. The plaintiff has had the full benefit of the evidence offered by him, it having been laid before the jury in the course of the trial; and it is therefore quite immaterial that it was not admitted at the time when it was first offered."

The principle and the authorities apply here. We have seen

People, *ex rel.* Phelps *v.* Oyer and Terminer, 83 N. Y., 436.

by the extract already given from the charge of the judge in the case before us, that the evidence first rejected, but afterward received, was given to the jury, and it does not appear that the defendants again offered to examine Turk, or that they were precluded from examining him, or other witnesses to the same point. If there was error, therefore, in excluding the evidence when first offered, the error was cured and the exception falls.

PEOPLE, *ex rel.* PHELPS *v.* OYER AND TERMINER.

New York Court of Appeals, 1881.

[Reported in 83 N. Y., 436, affirming 19 Hun, 91.]

When a party is extending cross-examination of his adversary's witness into new matter, material only to his own case in defense, he cannot, as matter of right, put leading questions.*

Henry W. Genet was indicted for feloniously obtaining the signature of the mayor of the city of New York to a written instrument for the payment of money, by means of false pretenses.

The representation was that the city was justly indebted to J. McBride Davidson in the sum of \$4,802, for materials for a public building, and a bill of the items was at the same time exhibited. This bill was certified by the commissioners, and sent to the comptroller's office, where it was audited, and a warrant for its amount was signed by the comptroller and subsequently countersigned by the mayor.

Upon the trial Davidson was called as a witness for the People, and was asked: "Was that bill that you first saw, the blue paper, made out by you? A. Yes, sir.

Q. Were the goods ever furnished by you? A. No, sir."

* * * * *

On cross-examination, the witness was asked: Q. "Did you, at the time, agree to furnish the materials included in the estimate for this court house building? A. Yes, sir.

Q. At that time did you say to Mr. Genet, in words or in

* Compare to the contrary, *Moody v. Rowell*, p. 233 of this volume.

People, *ex rel. Phelps v. Oyer and Terminer*, 83 N. Y., 436.

substance, that you could not furnish the materials unless the price of them was paid at the time of delivery? A. I did.

Q. This bill was then made out in this form, and delivered to Mr. Genet for the purpose of enabling him to obtain the money and pay for the materials which you had agreed to furnish?

Plaintiff's Counsel: I object to that question as leading, for one thing; and asking for an inference or conclusion from this witness; so far as we are concerned, we have simply questioned him as to the furnishing these goods, and nothing else; I have no objections to the witness being asked to state everything that occurred, but do object to the witness being called upon to ratify the testimony of the counsel.

The Court: Is not the proper course to allow him to go on and state what was said and done, and then it is for the jury to infer what the character of the transaction was?

Defendant's Counsel: This is on the cross-examination.

The Court: But this is a new matter, I think.

Plaintiff's Counsel: The whole of this examination is entirely new matter.

The Court: It would not be admissible to allow the witness to put himself in the place of the jury and give them the result of the negotiation. It would still be an objectionable circumstance brought into the case.

Defendant's Counsel: The counsel is mistaken in supposing that my question called for a declaration from the witness with regard to the purpose and intent of Mr. Genet; I was asking simply in regard to his own motive and purpose; I had supposed the rule to be where fraud was charged, and fraudulent intent and purpose were charged, it was competent to ask the witness in regard to his own emotion and intention.

The Court: That, I think, is not the inquiry. I think the witness should be asked to go on and relate what was done and said between himself and the defendant concerning this transaction, and if you desire to follow it by a general question as to intent, that is a matter to be put in afterwards.

Q. Was this bill prepared and furnished by you to Mr. Genet for the purpose, in your own mind, to enable him to raise

People, ex rel. Phelps v. Oyer and Terminer, 83 N. Y., 436.

the money to pay for the materials which you agreed to furnish mentioned in the bill?

Objected to as leading, and as new matter, and as asking for the inference of the witness from what actually occurred, which is for the jury to infer.

The Court: I don't think that is proper. I think the witness must go on and state what was said and done between himself and the defendant about the bill, and the purpose for which it was made, and his intent in making it. Exception taken.

Q. I see by the receipt, attached to the paper [bill] marked A, that the money was received by Mr. Genet on the 17th of July, 1871? A. That I don't know anything about.

Q. You didn't see him from that day, July 17, 1871, until you returned in September? A. I think it was about the 1st of September I saw him.

Q. Did he then offer you this money? A. He said he would produce the money, or bring it, and I could deliver the goods.

Q. Then, in substance, he asked for the delivery of the goods, and averred his readiness to pay the money?

Plaintiff's Counsel: I object to this style of examination as utterly improper.

Court: I think it is for the jury to draw the inference.

Defendant's Counsel: Do you rule that I am not entitled on this subject to leading questions? Court: Yes; the witness should state facts. Exception taken.

The Court: I think the witness should be asked what the motive was. If the evidence is not satisfactory upon this question, it may develop the necessity for putting another question.

Defendant's Counsel: I understand your honor to sustain the objection."

The Court: Substantially, for the present. Exception taken."

The Court of Oyer and Terminer convicted defendant.

The Supreme Court at General Term affirmed the judgment.

BRADY, J. [on this point said]: Leading questions are admitted on cross-examination, in which much larger powers are given to counsel than on the original examination. But upon

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cross-examination, a leading question, in respect to new matter, is objectionable, although the subject is within the discretion of the presiding judge. (*Harrison v. Rowan*, 3 Wash. C. C. Rep., 580; *Ellmaker v. Buckley*, 16 Serg. & Rawle, 77.) In the latter case, GIBSON, Ch. J., dissented from the doctrine broached in Phillips' evidence, that the cross-examination continues through all stages of the cause, and secures the right to ask leading questions in regard to new matter. The Supreme Court of the United States has declared that the right does not exist. (*The Philadelphia and Trenton R. R. Co., v. Stimpson*, 14 Pet., 448.) A party cannot cross-examine the plaintiff's witnesses as to new matter, in order to introduce his defence untrammelled by the rules of the direct examination. (*Castor v. Brovington*, 2 Watts & Serg., 505; *Floyd v. Bovard*, 6 *id.*, 75.) See, also, 1 Greenl. Ev., § 445, in which it is stated that this rule is considered to be well established. The learned authors of Cowen & Hill's Notes on Phillips' Evidence (see vol. 2, p. 730, n. 511) defend Mr. Phillips from the criticism of GIBSON, Ch. J., and concede that the text of Phillips does not assert the right to ask leading questions on cross-examination to sustain new matter of defence, and the case of *Harrison v. Rowan*, holding that there is no such privilege, is cited in the note with approbation. In *Jackson v. Son* (2 Caines, 178), it was held that the cross-examination of a witness in such a manner as to call forth new matter; made him the witness of the party cross-examining as to it, and this doctrine was approved in *The People v. Moore* (15 Wend., 423). It was said, prior to the last case cited, "there is an essential difference between a direct examination and a cross-examination; and the court ought not, except in peculiar cases, to permit the former to assume the character of the latter. (Per MARCY, J., in the *People v. Mather*, 4 Wend., 248). But in conclusion, it must be said, that the propriety of putting leading questions is a matter of discretion. This is, indeed, an elementary principle of evidence.

The witness, it must be observed, was not prevented by the ruling complained of from stating any facts, but the mode of obtaining such facts was designated. There is nothing, therefore, in the exception considered.

The Court of Appeals affirmed the judgment.

FINCH, J., said: Upon the cross-examination of Davidson, the defendant's counsel, while seeking to elicit new matter constituting an element of the intended defence, claimed the right to put leading questions, which was denied by the court. The rule in such case was very fully and ably discussed in the opinion of Judge Brady at General Term and the authorities cited. (*Harrison v. Rowan*, 3 Wash. C. C. 580; *Ellmaker v. Buckley*, 16 Serg. & R., 77; *Phil. & T. R. R. Co. v. Stimpson*, 14 Pet. 448; *Castor v. Bavington*, 2 Watts & Serg., 505; *Floyd v. Bovard*, 6 Watts & Serg., 75; *Jackson v. Son*, 2 Caines, 178; *People v. Moore*, 15 Wend., 419.) The conclusion reached, that such right does not exist, meets our approval. A different rule would enable a party to develop his defence untrammelled by the rules which govern a direct examination, and give him an advantage for which we can see no just reason. As to the new matter the witness becomes his own, and in substance and effect the cross-examination ceases. That is properly such only while it is directed to the evidence given in behalf of the adversary. When it passes beyond that it becomes the direct and affirmative evidence of the party, and should be subjected to the appropriate restraints. There is no reason in the nature of the case, why a direct examination should be guarded against the evil and danger resulting from leading questions which does not apply to an effort upon cross-examination to introduce a new and affirmative defence. We see no error in the ruling of the court in this respect.

NOTE ON RECENT CASES ON LIMITS OF CROSS-EXAMINATION.

Alabama: *Huntsville, etc., R. Co. v. Corpening*, Ala., 1893, 12 Southern Rep., 295 (error cannot be predicated on allowing cross-examination as to matters not referred to in chief; since it is entirely within the discretion of the trial court to allow it). *California*: *People v. Deegan*, 88 Cal., 602; s. c., 26 Pacific Rep., 500 (it is not error, where a witness testified in chief only as to the time of his meeting with certain persons, to refuse to allow him to be cross-examined as to what conversation he had with them on such occasion). *Watrous v. Cunningham*, 71 Cal., 30; s. c., 11 Pacific

 Note on Recent Cases on Limits of Cross-examination.

Rep., 811 (where a witness testifies in chief as to a part of a conversation the whole may be brought out on cross-examination). *People v. Dixon*, 94 Cal., 255; s. c., 29 Pacific Rep., 504 (where a witness testified in chief that defendant had induced him to leave the country so that he might not testify against him, it was held error not to allow the witness to be asked if the reason why he left was not on account of his father). *McFadden v. Santa Ana, etc., R. Co.*, 87 Cal., 464; s. c., 25 Pacific Rep., 681 (a plaintiff in an action for personal injuries, who has testified as to her pain and suffering, may be asked on cross-examination as to whether she called in a physician). *Colorado*: *Tourtelotte v. Brown*, 1 Colo. App., 408; s. c., 29 Pacific Rep., 130 (it is an abuse of discretion for the trial court to allow a witness to be cross-examined generally as to matters not embraced in chief and thus deprive the party who called the witness of the right to cross-examination as to such matters). *Florida*: *Adams v. State*, 28 Fla., 511; s. c., 10 Southern Rep., 106 (a party has no right to cross-examine a witness except as to facts and circumstances connected with his direct examination; if he wishes to examine the witness as to other matters he must do so by making the witness his own); *J. P. Tischler v. Apple*, 30 Fla., 132; s. c., 11 Southern Rep., 273. *Illinois*: *Hansen v. Miller*, 145 Ill., 538; s. c., 32 Northeast Rep., 548 (a party litigant like any other witness cannot be cross-examined as to matters as to which he has not testified in chief). *Poppers v. Peterson*, 43 Ill. App., 571 (where a witness testified that he signed an instrument without reading it, it was held proper upon cross-examination to inquire as to his previous business experience). *Indiana*: *Chandler v. Beall*, 132 Ind., 596; s. c., 32 Northeast Rep., 597 (it is not error not to permit a witness to be cross-examined as to matters not pertinent to the direct examination). *Kansas*: *City of Atchison v. Rose*, 43 Kan., 605; s. c., 23 Pacific Rep., 561 (it is not error not to permit cross-examination as to matters not relevant to the examination in chief). *Louisiana*: *State v. Walsh*, 44 La. Ann., 1122; s. c., 11 Southern Rep., 811 (a defendant in a criminal case may cross-examine a witness for the State as to any matter material to his defense, but such cross-examination should not be so extended as to allow the introduction of testimony without having laid a foundation required by the rules of evidence). *State v. Johnson*, 41 La. Ann. 1076; s. c., 6 Southern Rep., 802 (where a witness for one accused of murder has been examined as to the physical power and prowess of the deceased, questions by the State on his cross-examination as to like qualities of the accused, one germane and responsive to the subject matter of the examination in chief). *State v. McFarlain*, 42 La. Ann., 803; s. c., 8 Southern Rep., 600 (to prove an alibi a witness for defendant testified that defendant crossed a ferry at a certain time and did not return until the following morning. Held that it was proper cross-examination to question the witness as to other ferries, distances, etc.). *Michigan*: *Hay v. Reed*, 85 Mich., 296; s. c., 48 Northwest Rep., 507 (where plaintiff is offered as a witness any cross-examination affecting the merits of the cause is admissible, whether the particular transaction sought to be shown by such cross-examination has been referred to on the direct examination or not); *S. P.*

 Note on Recent Cases on Limits of Cross-examination.

Ireland *v.* Cincinnati, etc., R. Co., 79 Mich., 163; s. c., 44 Northwest Rep., 426; People *v.* Barker, 60 Mich., 279. Pickard *v.* Bryant, 92 Mich., 430; s. c., 52 Northwest Rep., 788 (where defendant attached a sale of stock by a firm as fraudulent and plaintiff examined a member as to the sale and change of possession, on cross-examination the witness may be interrogated as to the various dealings between the firm and its members; defendant is not required to show such facts by his own witnesses). *Missouri*: State *v.* McKenzie, 102 Mo., 620; s. c., 15 Southwest Rep., 149 (upon a trial for murder which took place outside of a saloon, one of the defendants, as a witness testified in chief that he did not strike the deceased with a cane. Held that it was proper to allow the witness to be cross-examined as to whether he was not leaning on a cane inside of the saloon before the homicide, tho' on the direct examination he had only testified as to what occurred outside of the saloon). Walter *v.* Hoeffner, 51 Mo. App., 46 (a witness called by one party to prove any fact may be cross-examined as to the whole case). *North Carolina*: State *v.* Allen, 107 N. C., 805; s. c., 11 Southeast Rep., 1016 (cross-examination is not limited to matters brought out on the direct.) *Pennsylvania*: Bohen *v.* Avoca Borough, 154 Pa. St., 404; s. c., 26 Atlantic Rep., 604 (in an action against a municipality for injury to property from an imperfect gutter, where a witness for defendant testified in chief as to the grade and condition of the gutter, and it might also fairly be inferred from his testimony that the work was done under the direction of the municipality, held that it was proper to ask upon cross-examination by whom the work was done). McNeal *v.* Pittsburgh, etc., R. Co., 131 Pa. St., 184; s. c., 18 Atlantic Rep., 1026 (where the plaintiff's witnesses testified as to the circumstances of a railway accident, it was held not error to permit defendant to cross-examine them as to the presence and gestures of the track foreman immediately preceding the accident, though not referred to on the examination in chief). Boyd *v.* Conshohocken Worsted Mills, 149 Pa. St., 363; s. c., 24 Atlantic Rep., 287 (in an action against a corporation for dividends, a witness for plaintiff testified in chief as to a demand for ten dividends, held that it was proper to exclude cross-examination as to a transaction which occurred several years before, though it might tend to justify a refusal of the demand; such matter should be proved as a part of the defense). *United States*: Home Benefit Asso. *v.* Sargent, 142 U. S., 691; s. c., 12 Supm. Ct., 332 (it is competent to cross-examine as to other parts of the same conversation which was not brought out on the direct examination).

Pennock v. White, 12 Weekly Dig., 516.

PENNOCK v. WHITE.

New York Court of Appeals, 1881.

[Reported in 12 Weekly Dig., 516; also, 85 N. Y., 654, without opinion.]

It seems that a witness called to testify to the signature to articles of co-partnership as showing the existence of partnership at a specified time, may be cross-examined as to its dissolution after that time; for as the articles raise a presumption of continuance, the same witness may be used to show matter in rebuttal of such presumption.

Erroneous exclusion of testimony is cured if other testimony subsequently brings out the same fact beyond controversy, so that the exclusion could not have affected the result. If an objectionable question is answered before objection made, and no motion to strike out is made, the reception of the evidence is not error.

A witness having been in the employment of a firm can testify directly as to who composed the firm. An objection that the evidence is secondary is not sufficient in the absence of any objection that the question called for a conclusion.

If after a witness has testified to a fact it appears that he testified from information and not from knowledge, the testimony may be stricken out as hearsay.

Proper form of question as to who was the company.

Plaintiffs sued defendants as copartners, doing business under the name of the Lawrence Brewing Company, to recover a balance due on sale of hops.

Defendant White was alone served, and defended on the ground of an alleged dissolution of the copartnership prior to the sale, of which plaintiffs had notice.

Upon the trial, Charles J. Miller was called by plaintiffs, was shown the articles of copartnership between the defendants, and testified: "That is my signature, as witness, I saw Mr. Wm. H. Nichols sign that, I believe * * * I know that I was asked by him to witness his signature."

* * * * *

On cross-examination, after the witness had testified that he was bookkeeper for Wm. H. Nichols and had charge of his cash book, he was asked: Q. "Did you have charge as late as March, 1872? Do you know of any checks being given or made by Wm. H. Nichols, payable to or delivered to Pennock & Andrews [plaintiffs] or either of said firm?"

Plaintiff's counsel objects to the question on the ground that this witness is called only to prove the signature to a written instrument, and it is not competent to cross-examine him generally.

Objection sustained. Exception taken."

[The defendants' articles of copartnership provided for no termination other than by one year's notice by one to the other. The transaction which was the basis of the suit had occurred less than one year after the commencement of the partnership.]

Pennock, one of the plaintiffs, was asked on cross-examination :

Q. "What money have you received from the Lawrence Brewing Company [the name under which defendants had done business] outside of the \$600, or by their direction, or from any one through them? A. To apply on the account, I have received only the \$600."

Plaintiffs counsel objected to the question as indefinite, irrelevant and immaterial. The referee sustained the objection. Exception taken.

Edward A. Nichols was called by plaintiff, and after testifying that he was employed by the Lawrence Brewing Company in 1871, was asked: Q. Who composed it in November, 1871.

Objected to by the defendant as calling for secondary evidence. Objection overruled and exception taken.

A. William H. Nichols and Andrew G. White.

Horace B. King called by defendant, testified that he had had charge of the defendant's brewery; on cross-examination, as to the dissolution of the partnership, he testified as follows :

"By Plaintiff's Counsel: Q. What sources of information did you have as to the dissolution of the firm? A. Both written and oral declarations of both parties that the firm was dissolved; that was all the source of information that I had.

Q. "To what do you refer when you speak of written sources of information? A. I refer to a letter received by me from A. G. White, and a letter received from Wm. H. Nichols by me; I had interview one day with Wm. H. Nichols; I think same day I received letter, 14th Oct., '71; it might have been

Pennock v. White, 12 Weekly Dig., 516.

the next day or the next; also with Mr. White, within a very few days after 14th October.

Plaintiff's counsel moved to strike out the testimony in chief of this witness as to the dissolution of the firm on the grounds: 1st, that it is secondary; 2d, that it is hearsay; 3d, that it appears that it is founded upon written documents, which are the best evidence.

Motion denied. Plaintiff's counsel excepted."

At the next sitting the referee announced that he had reconsidered his decision on the motion made yesterday by plaintiff to strike out the testimony of H. B. King, that the partnership was dissolved, and now decided to grant the motion striking out the testimony of H. B. King that the partnership was dissolved.

Exception taken.

William H. Nichols, the co-partner, who had not been served, was called by defendant and asked: "Q. Who was the Lawrence Brewing Company on the 6th day of January, 1872?"

Objection by plaintiff as immaterial, irrelevant and calling for conclusion of law. Objection sustained. Exception taken."

The witness was subsequently asked: "Q. Was defendant, Andrew G. White, one of the firm of the Lawrence Brewing Company on the 1st day of January, 1872, or any date subsequent?"

Objection by plaintiff's counsel as not best evidence; 2d, Conclusion of law. Objection sustained. Exception taken.

The witness also testified: "I wrote a letter to plaintiff in October, '71; had a copy of the letter with me—a letter book; don't remember whether I sent the letter to plaintiff by mail or whether I sent it over to his office; don't know that I had any conversation with him in regard to his receiving it.

Copy letter offered in evidence by defendant, dated Boston, October 18, 1871, addressed to plaintiff, signed by William H. Nichols."

Plaintiff admitted that he received notice to produce letter dated October 18, 1871. Plaintiff objected to the admission of the evidence on the ground: 1st, That it is not the best evidence; 2d, That there is no evidence that plaintiff ever received

it; it is not brought home to his knowledge in any way. The objection sustained and exception taken.

The witness also testified: "I went to Lawrence, October 14th; saw Mr. Jewett; told him that I had bought out Mr. White.

Plaintiff objected to anything said between Mr. Jewett and witness not in presence of plaintiff.

Defendant offered to show that this conversation was a revocation of the power of attorney to Jewett.

Objection sustained. Exception taken."

He was also asked: Q. Did you take possession of the brewery on that day? Did Mr. King leave the brewery? Both questions were excluded—the first as calling for a conclusion, the latter as immaterial.

The Referee rendered judgment for plaintiff.

The General Term of the Supreme Court affirmed the judgment, but did not pass on the rulings on admission of evidence.

The Court of Appeals affirmed the judgment.

MILLER, J. [*after disposing of a harmless error*]: It is also urged that there was error in excluding the question put to the witness, Charles J. Miller: "Did you have charge as late as March, 1872? Do you know of any checks being given or made by Wm. H. Nichols, payable to or delivered to Pennock & Andrews, or either of said firm?" The question was objected to by plaintiff's counsel, on the ground that this witness is called only to prove the signature to a written instrument, and it is not competent to cross-examine him generally. The objection was sustained and an exception taken. The witness had testified to the signature of William H. Nichols to the articles of co-partnership, and for the purpose of showing that the dissolution was known to the plaintiffs, the defendant undertook to prove the receipt of checks by plaintiff drawn by William H. Nichols individually. These articles would show when the partnership commenced, and raise a presumption of its continuance at the time of the dealings in question in January, 1872. To rebut such

presumption it was competent for the defendant to show the plaintiff's knowledge by the same witness whose testimony created the presumption, and he was not incompetent to show that fact because he was called merely as a witness to prove a signature to the written instrument. It appears, however, that the proof offered was afterwards fully brought out by other testimony, so that there was no controversy on the subject, and hence the rejection of the evidence offered would not have affected the result.

The question put to Pennock, one of the plaintiffs, as to what money had been received from "The Lawrence Brewing Company," outside of the \$600, or by their direction, or from any one through them, was answered before any objection was made, and the answer was allowed to stand without any motion to strike out the same. As no further question was put on the subject after the objection, or offer made, it cannot be said that any evidence offered was improperly excluded. It may also be remarked that the defence of payment was not interposed, nor any such issue made upon the trial. The finding of facts and the conclusions of the referee, we think, are sustained by sufficient evidence, and we are unable to discover any error in this respect.

The question put to the witness as to who composed the partnership in November, 1871, was properly allowed. The witness had been in the employment of the company, and could speak from his own knowledge on the subject, and the only objection made was that the evidence was secondary, and it was not claimed that it called for a conclusion.

There was no error in the decision of the referee in striking out the testimony of King, to the effect that the partnership was dissolved. It appears that he testified from information derived from oral and written communications with each of the two defendants separately, and it was therefore hearsay and secondary evidence, and hence was incompetent.

The decision of the referee in regard to the questions put to William H. Nichols, as to who the company was in 1872, was objectionable, because it called for a conclusion of law or an opinion, and not for a fact within the knowledge of the witness.

Platner v. Platner, 78 N. Y., 90.

In this respect the questions differ from the question put to another witness of a similar character, which was properly allowed. The allowance of these questions was also to a great extent a matter of discretion with the referee, the exercise of which is not the subject of review.

The copy letter, purporting to be from defendant, William H. Nichols, to the plaintiffs, and to be signed by said defendant, was properly excluded, as there was no evidence that it was ever received.

It was also incompetent to prove a conversation between a witness and a third party in the absence of the plaintiff. Nor was it proper to show a revocation of a power of attorney, without also connecting with it a notice to the plaintiff, proof of which was not offered. The revocation of such power by the defendant, White, could not be shown by the conversation offered to be proved between William H. Nichols and Jewett.

The questions put as to William H. Nichols taking possession of the brewery, and as to Mr. King leaving the brewery, are liable to the same objection as other testimony of a similar character, which has already been the subject of consideration, nor does such evidence appear to have been material.

No other objections are urged which demand especial consideration, and as no error is manifest, the judgment should be affirmed.

PLATNER v. PLATNER.

New York Court of Appeals, 1879.

[Reported 78 N. Y., 90.]

Whatever testimony will assist in knowing which party speaks the truth as to the issue in a conflict of evidence, is relevant.

On a question as to whether a husband had authority to act for his wife in the transaction in question, evidence of his prior and continued mode of dealing with her property and her knowledge and acquiescence, is relevant.

Whether the declarations of an alleged agent shall be received before proof of the agency is a question of the order of proof in the discretion of the trial judge.

Evidence admitted, either without objection, or properly after objection, which for any reason should not be considered by the jury or affect

Platner v. Platner, 78 N. Y., 90.

the result, is not necessarily to be stricken out, but may be retained in the discretion of the court; the remedy of the party being to ask for instructions to the jury to disregard it.

The office of an objection is to stop an answer. When the question is proper and has been put, and the witness answers it with proper and responsive matter, and of his own head adds something else irrelevant, an objection does not check it. The improper part of the answer is to be met, and its effect taken away, by motion to strike out, or request for instruction to the jury that they disregard it.

The rule, that where a statement has been proved, the party has a right to prove all that was said by the speaker at the same time and at the same conversation, that will in any way qualify or explain the statement—applies to declarations of a third person not a party to the action.

Action on a promissory note.

The defence was that the note was given as a memorandum or security to the plaintiff, a married woman at the time, when her husband, as her agent (being himself insolvent), procured the defendants to act for her in the purchase of government bonds, which the husband paid for with the wife's moneys, and left in the defendants' possession on their giving the note in question; and that subsequently they surrendered the bonds to the husband on his representation that he would deliver them to his wife and cause the note to be destroyed, and that the bonds were accordingly delivered to plaintiff.

Upon the trial, George Platner, the defendant, was called as a witness in his own behalf and was asked by defendant's counsel :

“Q. Do you remember your Uncle Stephen coming to your place in the fall of '66 in regard to any transaction? A. Yes, sir.

Q. Who was present at the time? A. My brother Henry, and it was at our house; before the hay barn.

Q. Was there anyone present except you three? A. No, sir.

Q. What took place at that time?

Objected to as calling for the declaration of a third person who had not authority to act for the plaintiff; and also it is a violation of the spirit of Code Proc., § 399. Overruled and exception taken.”

Thereupon the witness was allowed to state the conversation between himself and the uncle (Stephen) as to the intent to purchase bonds, and the subsequent conversation between the

two and the bank cashier in pursuance of that purpose; but nothing was brought out indicating that Stephen acted for his wife (plaintiff) in the transaction.

George Platner further testified on direct examination :

Q. "Did you ever have a conversation with Dr. Platner in the year '56 in relation to the Concklin note, so-called ?

Objected to as not within the ruling. Counsel for defendants proposed to show that Mr. Platner, while in this embarrassed condition, held a three thousand dollar note against Concklin; that he requested defendants to take that note and go to Concklin, and take from him a new note and collect the note for him, and that the note was subsequently collected and paid over to the plaintiff.

The Court: I must allow the evidence as tending to establish how he has been assuming to act for the wife, and how far it has been recognized and ratified by her.

Plaintiff excepted on the ground that the evidence was hearsay and immaterial.

Acts and declarations of the husband as to the Concklin note were then testified to; but no evidence to connect the plaintiff therewith was given.

Plaintiff moved to strike all the evidence as to the Concklin note as hearsay, irrelevant, immaterial and incompetent; the motion was entertained as seasonably made, but denied. Exception taken."

At Circuit, the defendants recovered.

The Supreme Court at General Term affirmed the judgment.

LEARNED, P. J., saying: It is urged by the defendants that in actions based on fraud, similar fraudulent transactions may be shown. Where that rule applies it is only to establish *intent*. The question here is simply whether the plaintiff's husband was her agent. Now previous similar transactions could be material only as tending to show that the plaintiff had recognized his agency, and therefore the defendant might rely thereon.

It may be that from the surrounding circumstances other than this Concklin transaction (and similar cases not shown to have come to her knowledge) there is abundance of evidence to show

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that the plaintiff allowed her husband to do as he pleased. She says herself that when she had business to attend to, she left him to see to it for her; that she would rather trust to him than to herself. And it might be, too, that the jury would find that the whole transaction was really one in which no one but her husband had any interest.

The learned justice who tried the case took this view of the evidence, which had been previously stated. He admitted it as tending to show how far the acts of the husband had been ratified and recognized by the plaintiff. And, indeed, the offer as to the Concklin note was to show that the avails had been subsequently paid to the plaintiff.

It cannot be said, therefore, when the evidence was offered, that it might not be, or be made material. The order of proof is a matter of discretion, and when the motion was made to strike out the evidence as to the Concklin note, the defendants had not finished their case. At the close of the whole evidence no motion was made to strike out this or any evidence on any ground. In his charge the learned justice referred to the previous transactions between the plaintiff's husband and the defendants. And no exception was made, nor was there any request made that the learned justice should call the attention of the jury to any alleged failure of the plaintiff to recognize her husband's acts, or some of them.

If the plaintiff's counsel had thought that in regard to any of these acts the plaintiff had not been connected with them by the evidence, he should have called attention to this. He should have insisted that the defendants had not given the evidence which was needed to make the evidence as to the Concklin note, or as to some other of the transactions.

As to some of the other transactions at least, there was evidence that the plaintiff had knowledge of her husband's acts which assumed to be on her behalf.

Judgment should be affirmed with costs.

The Court of Appeals affirmed the judgment.

FOLGER, J.: Though the objections to evidence were stated in different words, they were substantially that it was not rele-

vant. Now the meaning of the word relevant as applied to the testimony, is that it directly touches upon the issue which the parties have made by their pleadings, so as to assist in getting at the truth of it. It comes from the French *reliever*, which means to assist. Whatever testimony was offered, which would assist in knowing which party spoke the truth of the issue, was relevant; and when to admit it did not override other formal rules of evidence it ought to have been taken.

It is well, then, to see what was the issue raised by the pleadings. The complaint is upon a promissory note made by the defendants, jointly and severally, one day after date, to the plaintiff or bearer for \$3,569.31 with interest for value received. The answer alleges certain circumstances as going before and leading to the making of the note; sets up that the note was given for certain United States bonds, and that the amount of the one was the cost of the other; that those bonds were handed to the defendants by the plaintiff's husband, when they made and delivered the note to him; and that afterwards the bonds were handed back again to him upon a promise given that the note should be delivered up to them or destroyed. The allegation of those preceding circumstances was to tender an issue that by reason of the pecuniary embarrassment of the plaintiff's husband, and the rumors of her connection with his business affairs, it was prudent for the plaintiff in general that even investments made with her own money should not be in her name, but in the name of the defendants or one of them; and that in pursuance thereof these bonds were bought with her money in the name of one of the defendants, and this note given for the amount of the cost and expense thereof, and that to give color to the matter one of the defendants went with the husband of the plaintiff to make the purchase of the bonds in the name of that defendant, but with the money of the plaintiff and for her use and ownership. Apart from the allegation of the precedent circumstances, the answer substantially avers what was the consideration for the note, and that the note was in effect paid by a return of the same consideration.

The testimony shows that the reliance of the defendants to prove the preceding circumstances above-named and the pay-

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ment was necessarily upon facts which took place between them and the husband of the plaintiff. The note was to the plaintiff by its terms. It was to her or bearer, and thus negotiable. A payment to any one, who produced the note to them as the bearer of it, would have been a good discharge of the defendants from their obligation. But when that took place which they claim was in effect a payment of the note, it was not produced to them. Hence it was that though negotiable and payable to any one who was the bearer of it, they did not make a good payment of it to the husband, he not having the note then in possession, unless he had authority from the plaintiff to receive payment. And as the transaction between them and the husband was not technically a payment, but only in effect such, inasmuch as it was only an exchange of public securities for the note, it was not available against the plaintiff as a payment, unless her husband had authority to deal generally in her affairs, and to accept for her those bonds instead of money.

Thus it was material and proper for the defendants to prove that he had such authority; and any testimony was relevant thereto, which went to show his prior and continued mode of dealing with her securities and evidences of debt, and her knowledge and acquiescence. The extent to which such testimony should come in was in the discretion of the circuit judge. It was also relevant to prove that the consideration of the note was United States bonds. Had the allegation of the answer been to that purport that the defendants gave this note for those bonds; as a purchase of them to become the property of the defendants, and had such been the fact relied upon, it would have been enough to have shown that they made and delivered the note, and in exchange for it received the bonds. That was not the fact averred in the answer, nor claimed on the trial. The claim was that the bonds were bought for the plaintiff and with her money, in fact for her; but for prudential reasons in the name of a defendant, that they were left with the defendants for keeping, and the note taken, though evidence on its face of indebtedness, yet really as a means of insuring a return of the bonds when called for, or of obtaining a compensation if they were withheld. And the claim was that the return of the bonds was a carrying out of

the long preceding understanding on which they were received, and a discharge of the obligation of which the note was the proof. Hence testimony of any precedent negotiation or transaction between the defendants and the plaintiff, or her authorized agent, paving the way for or leading up to the formation of such a bargain and to its consummation, was relevant, if not too remote or disconnected.

It follows that testimony which assisted in making known the truth upon this issue, was relevant, and if competent in itself, and not in the face of other rules of evidence, ought to have been admitted.

We may now take up *seriatim* the points made by the plaintiff in this court. The first point made is that the testimony was illegally received, wherein one of the defendants sought to show that the husband of the plaintiff asked him to go to Catskill to get some government bonds in the name of that defendant, and the accompanying conversation. The objections made at the trial were, first, that it was the declaration of a third person, who had no authority to act for the plaintiff; second, that it was in violation of the spirit of the 399th section of the Code,* the husband having died before trial; third, that it was irrelevant. There was also a motion to strike it out as hearsay and incompetent.

The first objection was not well taken. True, there had not yet been authority shown in the plaintiff's husband to act for her. It is plain, however, from the record that the trial court knew that it was needful that that should be shown before his declarations were competent. It was an objection to the order of proof, which is always in the discretion of the court.

It was not open to objection for any reason arising from the provision of the 399th section.

Was the testimony irrelevant? By which is meant, in this case, that the connection between the fact which it proves and the fact in issue is too remote and conjectural. In determining whether evidence is relevant, all the issues must be kept in

* The rule now embodied in a modified form in § 829 of the Code of Civil Procedure, against testimony of an interested person to a personal transaction with deceased.

view, as it may be admissible as to one though not as to another. Thus, here, if the only issue was one of which we have spoken, that the defendants bought the plaintiff's bonds as their own, and gave their note for the amount of the purchase, and afterwards, it being then agreed that she take them in payment of the note, they were handed over and the note discharged, the evidence objected to might be irrelevant; for it would not matter where, when or how the bonds were in the first instance got by the plaintiff's husband. But the issue is that reasons existed in the affairs of the husband which made it needful for him and the plaintiff that her dealings should be veiled under the name of the defendants or one of them, and that she desiring to invest in these bonds, it was thought safer to do so in the name of the defendants or one of them, they giving their note to her, so as to make her secure. Then it is relevant to show what took place by word or act of the plaintiff, or by authority from her, which led the defendants to the act of giving the note and taking the bonds into their safe-keeping. All the acts and declarations of the husband are matter which touched the defendant George Platner, and led him and his brother up to the making of the note. They do not deny that they gave the note. They say that it is not to be read merely as an evidence of indebtedness, that it grew out of a state of circumstances by which they were induced to give their obligation in that form, for an arranged purpose, and having substantially carried out that purpose their obligation is discharged. In such case, it is relevant to show that the state of things existed out of which could naturally grow such a transaction. The claim is of an arrangement by which the investments of the plaintiff should be protected from her husband's creditors, by being taken in the name of the defendants.

Part of the testimony objected to was of acts to that end, of which the witness was personally knowing. The other part of it was of declarations at the time those acts were done; the *res gestae* therewith. That they took place sometime before the giving of the note does not matter. They were as much connected with that act as if it came in on the heel of them. It was they that led the defendants to the making of the note, in

the absolute form of it, and which made the giving up of the bonds by them afterwards a discharge of them from the note.

The second point of the appellant is that it was error to deny the motion to strike out from that evidence testimony of declarations of the husband. The ground taken was that it was hearsay and incompetent. Of course, it was upon the defendants to show that the husband was the agent of the plaintiff. After that should be shown his declarations, when about the work of the plaintiff, were not hearsay, but the same as if her declarations. Whether the declarations should be testified to before his agency was proved was a matter for the discretion of the trial court. It is hardly susceptible of contest, that before the trial was over he was shown to be her agent to deal generally in her affairs. Hence his declarations when part of the *res gestae* were not hearsay, and if relevant were competent. We have shown that they were relevant.

[Rulings on some other points are here omitted.]

The seventh point is that the testimony of George Platner, as to a conversation between him and his uncle about the Concklin note, should have been stricken out on motion thereto. The testimony was allowed, on the motion that knowledge and acquiescence would be brought home to the plaintiff. It may be conceded that it was not so done. It may be conceded, also, that when the motion to strike out was made, the defendants had made an end of their evidence as to the Concklin note. The motion to strike out was then made. It was not renewed, nor the matter again noticed. It should have been. "Evidence admitted either without objection, or properly on an objection, which for any reason should not be considered by the jury or affect the result, is not necessarily stricken out, but may be retained in the discretion of the court, the remedy of the party being to ask for instructions to the jury to disregard it. There was no request to instruct the jury to disregard the evidence, and no exceptions to the charge of the judge in respect to it, and the weight to be given to it" (see opinion in *MS.* of ALLEN, J., in *Marks v. King* [reported in note following this case]). This is conclusive against this point.

The eighth point is that the testimony of George Platner, that

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his uncle said in 1858-1859 "he wanted to get his property out of his hands as fast as he could," was illegally received. The objection was that it was hearsay, irrelevant, immaterial and incompetent. It will be noticed here that the objection was not taken to the question put by the defendant's counsel. The question was proper and pertinent. Nor was the objection made until the witness had given the answer. The answer had been uttered without objection and was before the court and jury. Of what avail was it then to object? The proper course was for the plaintiff's counsel to have moved to strike out the part of the answer deemed reprehensible. The question was proper. The answer, let it be conceded, was improper. The office of an objection is to stop an answer. When the question is proper and has been put, and the witness answers that with proper and responsive matter, and of his own head adds something else irrelevant, an objection does not check it. The improper part of the answer is to be met, and its effect taken away by motion to strike out, or request for instruction to the jury that they disregard. (*Farmers' Bank of Washington Co. v. Cowan*, 2 Abb. Ct. App. Dec., 88.) Though the court sustain the objection, the improper evidence is on the record. A motion made to strike out and granted removes it therefrom.

The ninth point is that the plaintiff should have been allowed to state, when she was on the stand as the witness, on her direct examination resumed, all that her husband said in a conversation, as to the taking place of which she had been asked by the defendants on her prior cross-examination. She was asked what was her best impression about there being at the bottom of the note a certain certificate. In reply she had said: I couldn't say; when I found the note I took and looked at it; talked it over with him. The question was then put: Did you and he say anything about there being a certificate at the bottom? She answered that she didn't think that they did. She also said, upon being questioned, that they talked some about the amount of the note; but nothing about it being dated back. On direct-examination resumed, plaintiff offered to show the whole of that conversation. It was excluded, for the reason that the defendants had not gone into it, save to show in a negative way that it was not talked about. There

is a limit to the extent to which a party may go in calling out what was said by and to him in a conversation, parts of which the other party has proven : (*Rouse v. Whited*,* 25 N. Y., 170). In the case just cited, the rule for that limit is adopted and followed which is laid down in *Prince v. Samo* (7 Ad. & Ell., 627). The rule is this: that where part of a conversation has been given in evidence, any other or further part of that conversation may be given in evidence in reply, which would in any way explain or qualify the part first given. In the case last cited, the rule is applied only to the declarations of a party to the action; and so far it is approved in *Garey v. Nicholson* (24 Wend., 350). But even if the conversation held by the plaintiff's husband with her should be deemed the declarations of a third person not a party to the action, the principle of the rule will apply. It is so laid down in 1 Phil. on Ev., 415, but without the citation of English authority directly in point.

The offer of the plaintiff, in the case in hand, was to show the whole conversation, not limiting the evidence to what was said that would explain or qualify what had been proved by the defendant. The plaintiff made also a specific offer to prove that her husband said that the defendants gave the note in suit for the \$2,900 note that she owned. Clearly this did not relate to anything which the defendants had shown as we have stated it.

The reason given by the trial court for excluding the evidence was that the defendants had not gone into the conversation, except in a negative way. Be this reason good or bad, the action of the court was proper, on the ground we have stated, and must be sustained.

Judgment affirmed.

NOTE.—In *MARKS v. KING*, 64 N. Y., 628, defendant was sued as endorser of a note. His defence was that the endorsement was a forgery. On the trial it was shown on behalf of the plaintiff, without objection, that the note in question was made to take up a previous note by the same maker, Bell, which also purported to bear defendant's endorsement, such previous note having been discounted by the bank; and plaintiff offered in evidence, bank drafts for the amount of the first note, given to Bell, the maker, offering in connection therewith, evidence that these drafts were the avails of the discount of the first note and delivered to Bell as such.

* This is the leading American case.

Marks v. King, 64 N. Y., 628.

At *Circuit* plaintiff recovered.

The Supreme Court at General Term affirmed the judgment. (Reported 67 Barb., 225.)

The Court of Appeals affirmed the judgment.

ALLEN, J.: But three exceptions taken at the trial are relied upon or urged by the counsel for the appellant in this court. The first objection and exception was to the admission in evidence of the drafts of the Susquehanna Valley Bank given to Bell upon, and as the avails of the discount of the note of March 2d, 1870, to take up which the note in suit was made. The discount of that note had been proved without objection, and the connection between it and the note in issue had been shown; and these drafts offered in evidence with proof that they were the avails of the note were competent as part of the *res gestae*. The admission of them in evidence did not necessarily or without other evidence affect the defendant or tend to establish the genuineness of his endorsement of the note in suit. The evidence was not only competent as a part of the history of the transaction but as laying the foundation for other evidence which might connect the defendant with it. The evidence was proper in another view, as showing that the note which formed the consideration of the alleged endorsement of the defendant had a valid inception, and that the bank paid value for it. The objection that at the time the defendant had not been connected with the drafts only went to the order of proof which as a general rule is and was in this case in the discretion of the court. The defect might have been and was attempted to be supplied by the plaintiff at a later stage of the trial.

The motion subsequently made to strike the drafts and all evidence relating thereto, out of the case, and the denial of the motion by the court, do not constitute any ground of a legal exception. Evidence admitted either without objection or properly over an objection, which for any reason should not be considered by the jury or affect the result, is not necessarily to be stricken out, but may be retained in the discretion of the court, the remedy of the party being to ask for instructions to the jury to disregard it. There was no request to instruct the jury to disregard the evidence and no exception to the charge of the judge in respect to it and the weight to be given to it.

The next objection presented by the learned counsel for the appellant is to the admission in evidence of a check purporting to be signed by the defendant, upon the Second National Bank of Jersey City, under date of February 7th, 1870. This check was for the avails of a note made by the defendant and claimed to have been discounted by the bank named, which it is claimed was paid and taken up with the drafts of the Susquehanna Valley Bank. That the note then discounted was made by the defendant for the accommodation of Bell is not disputed; the objection to the check was not that it was not made by the defendant, but for the reason that the witness then under examination, who was the cashier of the Jersey City Bank had no knowledge of the note being paid and no personal

Winchell v. Latham, 6 Cow., 682.

knowledge of the note or of the draft, and that it was not the best evidence of the discount of the note. At the time the objection was made it was assumed that the signature of the defendant was genuine, and was therefore some evidence that the note which he had made for the accommodation of Bell, had been discounted by the bank upon which the check was drawn. The subsequent testimony given by the defendant, tending to impeach the check and challenging its genuineness, cannot be referred to, to sustain the objection, taken without a suggestion that the check was not in fact signed by the defendant. If the check was genuine it was a circumstance connecting the defendant with the origin of the debt and the making of the note, the first in a series of which the note in suit was the last, as was claimed by the plaintiff, and of which there was some evidence; and of the cogency of that evidence the jury were the judges.

The only other point urged or relied upon by the counsel for the appellant was the refusal of the court to permit evidence to be given that Dickinson, a principal witness for the plaintiff, had been active in procuring the indictment of Bell for counterfeiting the endorsement of the defendant upon the note in suit. The evidence was properly excluded; it did not discredit his testimony either in respect to the declarations and admissions of the defendant or his opinion as to the genuineness of the endorsement as given under oath. Neither did it tend to impeach his character as a witness; there was no pretense or offer to show that his statements, either before the grand jury under oath or when not under oath, were inconsistent with his evidence upon the trial. The fact offered in evidence was entirely collateral and its rejection does not lay the foundation of an exception. (*Great Western Turnpike Road Company vs. Loomis*, 32 N. Y., 127.) We find no error in the record, and the judgment must be affirmed.

WINCHELL v. LATHAM.

New York Supreme Court, 1827.

[Reported in 6 Cow., 682.]

An accidental disclosure of the nature of a communication called out on cross-examination by a question only intended to elicit the *fact* of such a communication, is not necessarily a ground for allowing the adverse party on re-direct examination to call for the consequent conversation.

Action on three promissory notes, one of which was for \$2,100.20, signed by Porter, defendant's testator.

Defendant contended that the note was obtained from Porter by imposition when he was in a state of intoxication, or that he supposed it to be a small note, probably for twenty-one dollars

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and twenty cents; and that the word hundred was fraudulently inserted by the plaintiff either before or after it was signed; or if signed with a knowledge of its contents, that it was given without any legal consideration.

Upon the trial Simon Hyde was called as a witness for the defendant and stated on his direct examination, that in November or December, 1823, Winchell showed him a note, upon back of which was written Oliver Porter's note, for \$2,100 and some cents, which he believes to be the note in question. Winchell was then on his way to Connecticut and the witness asked him how he came by such a note against Porter? Winchell replied that he had some money which he did not wish to carry with him to Connecticut; and he had left it with Porter because he knew it would be safe and that he would not use it.

Upon his cross-examination he was asked by the plaintiff's counsel if he had ever told anybody that he had seen such a note or that the plaintiff had such a note? and if he had, when and whom? The witness answered that the first person to whom he mentioned it was Porter, the testator; that it was after Winchell's return from Connecticut; but how long he could not tell. The counsel for the defendant then asked the witness what Porter said about the larger note when he gave him the information?

This question was objected to by the plaintiff's counsel, on the ground that the defendant could not give in evidence the declarations of Porter in his own favor. Objection sustained and question excluded.

At Circuit plaintiff recovered.

The Supreme Court reversed the judgment. SUTHERLAND, J. [*after stating facts*]: The decision of the judge was undoubtedly correct. The witness was not asked whether he had ever informed Porter that he had seen the note? But the question was general, if he had informed anybody and whom? He was the defendant's witness; and it is not to be supposed that the plaintiff knew what his answer would be.

The question was not, therefore, put with the view or expectation of bringing home to Porter knowledge of the existence of

the note ; but for the purpose, probably, of testing the accuracy of the witness, by compelling him to name the individuals to whom he had communicated the fact, if any ; so that they might be called to corroborate or impeach him. The disclosure, therefore, came out accidentally, and did not lay the foundation for the course of inquiry which the defendant had not a right to pursue upon the direct examination. Occurrences of this sort are not only common, but inevitable in almost every trial. It is impossible to anticipate what the answer of a witness will be to a general question, until his answer is given. If it is of a nature which would have been inadmissible upon a direct and specific inquiry the course is not to permit the inquiry to be pursued, and the evidence to be repelled by other testimony ; but to exclude the answer from the consideration of the jury, so far as it was improper to have been given. There is no danger of a jury being misled or prejudiced by such a circumstance. The presiding judge will explain to them why they are to disregard the evidence ; and that no inference is to be drawn from it against the opposite party, because he is precluded from pursuing the inquiry, and explaining it. If the plaintiff's counsel had asked specifically whether the witness ever communicated the information in relation to the note to Porter, what Porter said on that occasion would probably have been competent evidence ; for the inquiry could have been made with no other view, than to raise the presumption of his admission of the genuineness and validity of the note ; and that presumption the opposite party, of course, ought to be permitted to repel. The question would be considered as embracing, not only the information communicated by the witness to Porter, but Porter's answer also ; and the answer would then be evidence against the plaintiff, having been called for by him. But there would be no safety in putting a general question to a witness upon his cross-examination, if his answer might be the means of rendering the declaration of the opposite party evidence in his own favor, without being called for by his antagonist.

[*Rulings on other points are here omitted.*]

Storm v. United States, 94 U. S., 76.

STORM v. UNITED STATES.

United States Supreme Court, 1876.

[Reported in 94 U. S., 76.]

It is not error, on cross-examination, to refuse to allow questions to be put merely to ascertain the names of persons whom the cross-examining counsel may wish to call as witnesses. *So held* in a civil case.

Action at law by the United States against principal and sureties on a contract to supply hay, grain, etc.

The plaintiffs claimed damages among other things by reason of the loss suffered by them in being obliged to purchase in the market, in consequence of the contractor's failure to supply.

The witness called by the plaintiffs to prove the facts in this respect, stated, on cross-examination, that sometimes, when he did not have the supplies wanted on hand, he went out and purchased what was necessary to fill the order, and that he usually filled the orders on the same or the following day.

In the course of his examination-in-chief the witness gave the name of a firm of whom he bought some hay to fill some one of the orders, and the defendants inquired of whom he purchased the quantity of oats charged to the United States in his account; to which interrogation the plaintiffs objected, and the court sustained the objection, and excluded the question.

Due exceptions were taken to the preceding rulings, and the defendants asked the witness if he did not commute with some of the subordinate officers for some portion of the forage to which they were entitled, paying them in money instead of forage, grain or straw; and, if so, he was asked to state what quantity of such supplies were charged on his books during those three months as having been purchased in open market, which were not so purchased, but were commuted by the witness with the officers, paying them money instead of delivering the required supplies; to which the witness replied that he could tell by looking at his books. He was then requested by the defendants to look at his books and to state what amount of such supplies, within that period, was charged by him which was not purchased in open market and delivered to the United States. Prompt objec-

tion was made to the question as irrelevant and immaterial, and it was excluded by the court.

The United States recovered and the defendants brought error.

CLIFFORD, J. [*on this point*]: Seasonable exception was taken by the defendants to the ruling of the court, excluding the question propounded to the witness called by the plaintiffs, of whom he purchased the quantities of oats which he furnished to the United States. Three grounds are suggested to show that the defendants were entitled to have an answer: 1. That the answer might have affected the credibility of the witness. 2. That the defendants, if the name of the seller of the oats had been given, might have called him as a witness and perhaps might have proved by him that the price paid was not as great as represented, or that a less quantity than that charged had been delivered. 3. That the answer might have shown that persons had an interest in the sale of the oats who are prohibited by the contract from having any share in furnishing such supplies.

None of the reasons assigned to support the exception are entitled to any weight when considered in connection with the explanations given in the bill of exceptions.

Evidence of an undisputed character had previously been introduced, showing that the requisitions for such supplies were not in excess of the quantity prescribed by law, and that the United States did not purchase and pay for any greater quantity than that specified in the requisitions, and that the purchases were made in the open market, and that the prices paid did not exceed the fair market value of supplies purchased.

Litigants ought to prepare their cases for trial before the jury is empanelled and sworn; and if they do not, they cannot complain if the court excludes questions propounded merely to ascertain the names of persons whom they may desire to call as witnesses to disprove the case of the opposite party. Courts usually allow questions to be put to a witness to affect his credibility; but it is plainly within the discretion of the presiding judge to determine whether, in view of the evidence previously introduced, and of the nature of the testimony given by the witness in his examination in chief, it is fit and proper that ques-

tions of the kind should be overruled, and to what extent such a cross-examination shall be allowed. *Sturgis v. Robins*, 62 Me., 293; *Prescott v. Ward*, 10 Allen, 209; *Wroe v. State*, 20 Ohio St., 460; 1 Greenl. Evi., §449.

Purchases to supply deficiency arising from the failure of the contractors to perform their contract were required to be made in open market, in order to ascertain the excess of cost, if any, beyond the contract price; and the bill of exception shows that the evidence to prove that the purchases made by the United States were so made was undisputed and uncontradicted. Still the defendants ask the witness called to prove those facts whether he did not commute with some of the subordinate officers for a portion of the forage to which they were entitled, instead of delivering the same to such subordinate officers, to which no direct answer was given; but when the witness was asked if he could state what quantity of such supplies were charged on his books as delivered, which was adjusted by commuting the same with subordinate officers, he answered that he could by looking at his books. Prior to that, the witness had stated that the prices charged were regular market prices in gold coin, which is in strict conformity to the terms of the agreement; but the defendants requested the witness to examine his books, and to state what the amount was which had been commuted; to which interrogatory the plaintiff objected, and the court excluded the question.

Interrogatories calling for immaterial testimony may be excluded in the discretion of the court, as shown by the authorities to which reference has previously been made. Doubt upon that subject cannot be entertained, and it is equally certain that it is error to exclude a question, proper in form, which calls for evidence material to the issue. Difficulty frequently arises in determining whether a particular question falls within the one or the other of these categories; and in solving that doubt, it often becomes necessary, especially in an appellant court, to ascertain what the state of the case was when the question was propounded, and what the effect of the evidence would have been if it had been admitted.

No attempt is made to impeach the fairness of the requis-

People v. Fitzgerald, 8 N. Y. Supp., 81.

tions made by the quartermaster, or to show that they were greater than the public service required; nor is it contended that the prices paid to supply the deficiencies were higher than the regular market prices in gold coin. What the defendants suggest is, that the agent employed to provide and deliver the deficiency paid some of the subordinate officers in money, instead of delivering the required amount of forage and grain, as he should have done. Both the agent and the subordinate officers in question agreed to the commutation; nor is it suggested that the quartermaster approved the commutation, or that he had any knowledge of the irregular transaction of the agent. Proper charges were made by the agent, and the same were duly paid by the proper disbursing officer.

Viewed in the light of these suggestions, it is clear that no injury resulted to the contractors. They did not suffer by the irregularity, nor is it perceived that it is a matter with which they have any concern, and it certainly furnishes no grounds for reversing the judgment.

Judgment affirmed.

NOTE.—Compare *KIERNAN v. ABBOTT*, 1 Hun, 109, s. c. 3 Supm. Ct. (T. & C.) 755, where, in an action to enjoin surreptitious obtaining of news—defendant having testified, on examination before trial, that the news he furnished was obtained direct by cable from London, through a New York banking house—it was proper to compel him to answer through what banking house the despatches were received, in order that plaintiff might have an opportunity to call the members and clerks of the house and examine them.

PEOPLE v. FITZGERALD.

New York Supreme Court, 1889.

[Reported in 8 N. Y. Supp., 81, s. c. 27 N. Y. State Rep., 595].

In a criminal case, a witness who, in testifying to the commission of the offense, has disclosed the fact that a third person was present, may be required on cross-examination to state who it was.*

The defendant was convicted of the crime of selling liquor on Sunday, without license to sell the same. One Puttenburgh

* If no objection be made the name may be given by the witness in writing and submitted to the judge and the counsel without making it public. And this doubtless may be required by the judge for the prevention of unnecessary scandal.

People v. Fitzgerald, 8 N. Y. Supp., 81.

testified that he went to defendant's saloon on Sunday night. That he bought fifteen cents worth of whiskey there. That he went in alone and found two other gentlemen there. Upon cross-examination the witness was asked whom he saw after he got there, and this question was excluded upon the objection of the people.

The *Supreme Court* on appeal reversed the judgment.

BARNARD, P. J.: This was an erroneous ruling. The credibility of the witness was for the jury, and the circumstances surrounding the commission of the offense with the names of those present were material.

The defendant was sworn and denied the facts and all knowledge of the offense. It was impossible for the accused to produce in his behalf the persons alleged to be present, unless the question put was allowed and answered.

PRATT, J., concurred.

C., M. and St. P. Railway Co. v. Artery, 137 U. S., 507.

CHICAGO, MILWAUKEE AND ST. PAUL R. CO. v.
ARTERY.

United States Supreme Court, 1890.

[Reported in 137 U. S., 507].

A previous written statement by the witness, shown to him on cross-examination and admitted by him to have been signed by him, cannot be excluded from use for the purpose of impeachment, merely on the objection that it was put into writing by another person for the purposes of being signed by the witness, and that such other person ought to be called to testify to the statements orally made to him.

If a witness has admitted his signature of a paper previously signed by him, it is not error as against a general objection, to allow a particular part to be read to him and to require him to answer whether it is correct. The objection that the whole paper should be read as the best evidence of its contents should be specifically made.

Action for injuries sustained by alleged negligence of the defendants.

The question here presented arose in consequence of the course of defendants' counsel in using by way of discrediting the testimony given in plaintiff's behalf by his brother, a statement given by the brother to the defendants' claim agent while the casualty was fresh.

The facts appear in the opinion.

In the Circuit Court, plaintiff recovered.

The Supreme Court reversed the judgment.

BLATCHFORD, J. [*after passing on other questions*]:

At the trial one Jerry Artery, a brother of the plaintiff, was called as a witness by him. He was on the hand-car with the plaintiff at the time of the accident and saw all that occurred. He testified as to the speed of the car, and as to its size and its cramped and crowded condition, and as to the fact that there was nothing on it in front upon which the plaintiff could rest his feet while he was holding the shovel, and as to the arrangement of the cattle guards. In the course of his cross-examination, the following proceedings occurred:

"Q. On the 23d of March, 1886, at Harper's Ferry, in the

C., M. and St. P. Railway Co. v. Artery, 137 U. S., 507.

presence of Mr. Buell, did you sign a written statement, stating what you knew about this case and about the accident to your brother, after the written statement had been read over to you?

A. Yes, sir. Q. I will show you now the written statement and ask you whether that is your signature? Written statement shown the witness hereto attached and marked Exhibit A. A. That is my signature there. Q. In the written statement which I have just shown you you state as follows: 'At the time Jim got hurt we were running from $4\frac{1}{2}$ to 5 miles an hour—certainly not to exceed 5 miles.' Is that statement correct? Objected to by plaintiff. Objection sustained.

"The grounds upon which the court sustained the objections to interrogatories to this and other witnesses, based upon a written statement signed by the witness, and to the introduction of the written statements themselves, were, that it appeared that the statements were not volunteered by the witnesses, but that the company had sent its claim agent after the happening of the accident, to examine the employés of the company who were present at the time of the accident, in regard to the transaction; that the statements made by the witnesses were not taken down in full, but only a synopsis thereof made by the agent, the correctness of which is questioned by the witnesses in some particulars, although such written statement was signed by the witness; that, upon the trial of this case, these statements, thus obtained, were sought to be used not alone as a means of impeaching the witness, but as evidence of the matters therein recited; that it is apparent to the court that, whether so intended or not, these statements become a ready means of confusing and intimidating witnesses before the jury, and that, if it be permitted to parties to thus procure written statements in advance from witnesses, and then use the same in examining such witnesses, it will enable parties to shape and control the evidence in a cause by committing the witnesses to particular statements, couched in the language not of the witness, but of the person carrying on such *ex parte* examination; that these growing abuses can only be prevented by entirely excluding such statements, thus procured, from being introduced in evidence for any purpose; that, if the party desired to impeach a witness by show-

ing contradictory statements made by him, the person to whom or in whose presence such alleged contradictory statements were made should be called as a witness, so that opportunity might be afforded of placing before the jury the statements actually made by the witness sought to be impeached, and not a mere synopsis thereof made by another person, and the accuracy of which, in some particulars, was challenged. Exception by defendant."

The following further proceedings took place on the cross-examination of the same witness: "Q. On the occasion I have referred to, did you make this statement: 'Six men on a hand-car have plenty of room. We often have had eight and ten men on a hand-car of the same size?' Objected to by the plaintiff; objection sustained; exception by defendant. Q. Did you, on the occasion I have referred, at Harper's Ferry, say as follows: 'I am a larger man Jim ever was and my legs are a great deal longer. I have never had any trouble in keeping my feet up when I sat on the front of the car?' Objected to by plaintiff; objection sustained; exception by defendant. Q. On the occasion referred to, did you state as follows: 'If a man is holding a shovel on the rail and he is sitting on the front of a hand-car there is no way for him to get hurt unless he forgets himself and lets his feet drop down?' Objected to by the plaintiff; objection sustained; exception by defendant. Q. On the occasion referred to, did you state: 'The hand-car was in good condition, nothing broken about it in any way. It was an ordinary car, full size?' Objected to by plaintiff; objection sustained; exception by defendant. Q. Did you, on the occasion referred to, state as follows: 'I am foreman at present on section No. 20. The top of the ribbons on the ties of the cattle-guard was about level with the ball of the rail?' A. Well, sir, I don't remember whether I did or not say that. Q. If you did say that, was it the truth or not? Objected to by the plaintiff; objection sustained; exception by defendant.

Subsequently, while the defendant was putting in its evidence, the bill of exception says: "Thereupon the defendant offered in evidence, for the purpose of impeachment, the statement under date of March 21, 1886, shown the witness Jerry Artery,

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and hereto attached, marked Exhibit A, which, on objection by plaintiff, was ruled out by the court; to which ruling the defendant, at the time, excepted." The court, in sustaining the objection, stated that it deemed the proper method to be to produce the person to whom the alleged statement was made, and to prove by him what the witness may have said on the occasion. Exhibit A, thus referred to, is a paper signed by the witness, and contains the statements set forth in the six questions thus excluded, as above.

That the evidence covered by the six questions was material to the issue, is apparent. They related to the speed of the car, to the question of its size and whether it was crowded or not, to the question whether the plaintiff could have kept up his feet without a foot-rest, and to the question of the condition of the cattle guard.

It is an elementary principle of the law of evidence, that if a witness is to be impeached in consequence of his having made, on some other occasion, different statements, oral or written, from those which he makes on the witness stand as to material points in the case, his attention must first be called, on cross-examination, to the particular time and occasion when, the place where, and the person to whom he made the varying statements. In no other way can a foundation be laid for putting in the impeaching testimony. In the present case, it is apparent that the views of the court, as set forth in the bill of exceptions immediately after the exclusion of the first question, which is above stated to have been excluded on the cross-examination of the witness Jerry Artery, must have been founded not only upon what had at that time transpired, but also upon the subsequent proceedings at the trial, and were the views of the court upon additional and kindred questions which arose in the case, because, at the time such first question was asked upon cross-examination, and excluded, it had not yet appeared in evidence under what circumstances the written statement was made by the witness. Moreover, it was stated by the court that the written statements of the witnesses "were sought to be used not alone as a means of impeaching the witness, but as evidence of the matters therein recited"; whereas, when the statement signed by the witness

Jerry Artery was offered in evidence and excluded, it was distinctly offered "for the purpose of impeachment," and it is not otherwise stated in the bill of exceptions that it was offered for any other purpose; and, in excluding it, the court excluded it as so offered.

We think the Circuit Court erred in laying it down as a rule that a written statement signed by a witness, and admitted by him to have been so signed, cannot be used in cross-examining him as to material points testified to by him; and in announcing it as a further rule, that the only way to impeach a witness by showing contradictory statements made by him, is to call as a witness the person to whom, or in whose presence, the alleged contradictory statements were made. The foundation must first be laid for impeaching a witness, by calling his attention to the time, place and circumstances of the contradictory statements whether they were in writing or made orally; and the court, in the present case, excluded that from being done.

The written statement having been presented to the witness, and he having admitted that what purported to be his signature to it was his signature, it was perfectly open to him to read it, and he could have been inquired of as to the circumstances under which it was taken down and signed, so as to advise the jury as to its authenticity, and the credit to be given to it. The bill of exceptions does not show that the plaintiff's counsel asked the witness to read the statement, or asked the court to have it read to him, or that the witness did not read it, or did not have it read to him. The exclusion of the first question put to him and excluded, namely, "Is that statement correct?" did not refer to the entire written statement, but to the statement in it as to the speed at which the car was running. That inquiry was directly pertinent to the issue that was being tried.

The rule of evidence invoked by the plaintiff, and laid down in the *Queen's Case*, 2 Brod. & Bing., 284, 288, is that if, on cross-examination, a witness admits a letter to be in his handwriting, he cannot be questioned by counsel as to whether statements such as the counsel may suggest are contained in it, but the whole letter must be read as the evidence of the existence of the statements. This principle is not applicable to the present

Kosmak v. Mayor, etc., of New York, 117 N. Y., 361.

case, because the plaintiff did not take the objection that the whole statement was not, but should have been, read as evidence, and the court, with the assent of the plaintiff, excluded it from being read in evidence.

The case of Vicksburg & Meridian Railroad v. O'Brien, 119 U. S., 99, is not in point. In that case, which was a suit against a railroad company to recover for personal injuries received by an accident to a train, a written statement as to the nature and extent of the injuries, made by the plaintiff's physician while treating him for them, was held not to be admissible as affirmative evidence for the plaintiff, even though it was attached to a deposition of the physician, in which he swore that it was written by him and that it correctly stated the condition of his patient at the time referred to. The question was not one which arose on the cross-examination of a witness or in regard to his impeachment.

Nor was the present case one involving the well-established proposition that incompetent questions are not allowable on cross-examination in order to predicate upon them an impeachment or contradiction of the witness.

The judgment is reversed.

KOSMAK v. MAYOR, ETC., OF THE CITY OF NEW YORK.

New York Supreme Court and Court of Appeals, 1889.

[Reported in 53 Hun, 329, and 117 N. Y., 361.]

It seems, that in cross-examining a witness, counsel may read a statement previously made by the witness in writing; asking him whether he made such statements; and the fact that he showed the paper to the witness before so doing, and the witness admitted his signature, does not necessarily entitle the party who called the witness to read the other statements contained in the writing.*

An action to recover damages by reason of the negligent management of a sewer in front of plaintiff's premises, causing the refuse to be emptied upon plaintiff's premises.

* The better practice is, where there is no desire to lay foundation for contradiction, to use the paper simply as brief or instructions for cross-examination, in which case it is clear that the other side cannot use it.

Kosmak v. Mayor, etc., of New York, 117 N. Y., 361.

On the trial, Emil H. Kosmak was called as a witness in his own behalf and testified on cross-examination that, "shortly after I brought my claim I was subpoenaed to appear before the comptroller to tell the nature of my claim * * * * * what I then said, I said under oath and my statements were then taken down by a stenographer as is being done here now, and afterwards they were written out and sent to me and I signed it and swore to it the second time."

Q. (Showing paper). "Is that your signature?" A. "Yes." [It was admitted that he was sworn.]

Q. "On that occasion, this examination was taken on the 8th of January, were you asked this question (reading from said examination): 'What are the elements of your damage here in dollars and cents?' and did you answer, 'I don't know?'" A. "Yes, if I gave that answer, that is correct, I don't know." * *

Q. "And then (again reading from said examination) were you not asked this question: 'State them as well as you can' (referring to elements of damage), and the best answer you then gave was: 'I am suing for \$50,000?'" A. "That is correct."

Q. "Then (again reading from said examination) you were asked these questions: 'How do you fix that amount?' And you answered: 'I had all my goods laying in the cellar;' question, 'your stock?' and you answered: 'Liquors, etc.;" question: 'Did you lose all the stuff that was in the store room?' and you answered: 'Not all, it was mostly all spoiled.'" A. "All my goods were broken and completely upset."

On re-direct examination of Mr. Kosmak:

Plaintiff's Counsel: "We offer in evidence the balance of the examination before trial of Mr. Kosmak, parts of which have been read by defendant's counsel."

Objected to on the ground that they cannot offer any affidavit in corroboration of their own witness.

Plaintiff's Counsel: "We offer in evidence and read this examination; you cannot read parts of it and thereby let that impression go to the jury. We will read the balance."

The Court: "I have my doubts about that. The distinction that comes to my mind is this, that if parts of a deposition are read for the purpose of contradicting a witness, then

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that does not necessarily make the whole deposition evidence. I suppose that is just what defendant's counsel used this for."

Defendant's Counsel: "That was my only object."

Plaintiff's Counsel: "The Corporation Counsel takes a deposition and picks out one or two parts favorable to him, and asks the witness if he did not swear so and so. Of course, what precedes it or what follows it, the jury knows nothing about. They don't see what the questions were the man labored under, as we have seen them here to-day. I propose, therefore, to read the questions immediately preceding and immediately following the parts read by the Corporation Counsel, for the purpose of showing the circumstances under which those answers read by him were given, and they are qualified by those very facts; it would be unfair to take a part of the statement, and that is about what it is."

The Court: "That depends upon the technicalities of the rule of evidence. That would all be very true if the Corporation Counsel offered parts of the deposition in evidence as admissions under oath of the plaintiff. That would undoubtedly bring in the rest of it, but he didn't read it. He merely read to the witness for the purpose of contradicting the witness, and asked him if he didn't swear so, and if he said he did, isn't that true. Then it is in evidence for the purpose of affecting with the jury his credibility that he has sworn at some time differently."

Plaintiff's Counsel: "I offer the deposition in its entirety, upon the ground that it is competent; an examination taken before trial under a statute which gives the Corporation Counsel the right to take it; either party has the right to read it."

The Court: "I don't think it is admissible. Have it marked for identification and take your exception." Exception taken.

At the trial defendant prevailed.

The Supreme Court at General Term affirmed the judgment.

VAN BRUNT, P. J. [DANIELS and BARRETT, JJ, concurring, said on this point:] The record shows that the original of such examination was in court, and the plaintiff was shown what purported to be his signature to such examination and asked if it was his, and he said it was. He was then asked whether he did

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not swear thus and so in that examination before the comptroller, and a variety of questions were put to him in that form. It appears from the record (improperly, as no such statement should have been made in view of the manifest manner in which the question was put) that the questioner read from this examination, and asked the witness whether he did not swear thus and so before the comptroller. It was not at all necessary, in order to frame a perfect question, that he should have shown plaintiff this examination or read from any portion of it, but if he chose to put the question, using the examination for the purpose of framing the question, the examiner had a right to do so. He was not reading the examination in evidence or any part of it. He was only asking the witness whether, on a previous occasion in connection with this transaction, he had not stated certain things. This gave no right, upon the part of the plaintiff, to have read the whole of his deposition. If there was anything that was pertinent in reference to the matter inquired about, and which would explain the answer which he then made, it was competent, upon the part of his counsel, to have asked him "Do you not also state thus and so" in connection with the matter about which you have testified? Or in the event of his having been asked for a statement which formed part of the testimony relating to a particular point, he could have been asked to state the balance relating to that subject. But the mere fact of his having been asked whether he had or had not testified on a previous occasion in a certain way in no way gave the plaintiff the right to read the balance of such deposition in evidence, as no part of the deposition ever had been offered in evidence, and it was only a method of cross-examination, well recognized and well established.

Plaintiff appealed; and his counsel relied on the rule supported by numerous authorities, that when part of a statement has been given in evidence, the adverse party is entitled to prove the residue so far as it tends to explain or qualify or vary the use which might be made of the part already proved.

The Court of Appeals affirmed the judgment.

ANDREWS, J. [*in passing on the point here in question, said :*]

Arnold v. Allen, 9 Daly, 198.

The point that the plaintiff was excluded from testifying to what was stated by him in his deposition presented to the comptroller, is not ground of reversal. It is claimed that the part of his statements in the deposition proved by the defendant bearing upon the correctness of his claim, as to items of damage, as made before the jury, tended to impeach his credibility, and therefore may have influenced the jury in determining the credit given to his evidence as to the obstruction being in the Frankfort street sewer, and not in the drain. The alleged impeachment of the plaintiff's credibility by the statements in the depositions proved by the defendant, was at most very slight. The exclusion of the plaintiff's evidence in explanation could have had, we think, no material influence on the case.

ARNOLD v. ALLEN.

New York Court of Common Pleas, 1880.

[Reported in 9 Daly, 198.]

In an action against a husband for goods delivered to his wife and alleged to have been sold to the husband and on his credit,—*Held*, that the fact that the charge in plaintiffs' books of account was against the wife, did not preclude recovery, if the credit was in fact given to the husband; and that evidence was admissible to show that it was the plaintiffs' custom to charge the goods to the ladies who dealt with them, and send the bills to the husbands.

Where a witness is examined at the trial after having been examined under a commission before the trial, it is not allowable in cross-examining to read to the witness the answers given under the commission and ask if he or she had so testified, merely for the purpose of proving in that way that he had.*

If such testimony is used to impeach the witness it should be read to the jury.

If a fact called for by a question put on cross-examination is competent within the rule that disparaging questions, not relevant to the issue, may be put, an objection to it as immaterial is not sufficient.

Action to recover for goods sold to defendant and delivered to his wife.

* Compare the two preceding cases.

Arnold v. Allen, 9 Daly, 198.

On the trial Thomas H. Lyons, an employee of the plaintiff, was called as a witness and testified that Mrs. Allen applied for an account at the store in the fall of 1874.

He was subsequently asked the following questions by plaintiff's counsel: Q. "Now, state at the time these goods were purchased or at the time the credit was opened by Mrs. Allen at the store of the plaintiff, with whom was the arrangement made?

Objected to on the ground that it was shown that the goods were sold to her. Objection overruled and exception taken.

A. With me. Q. At the time she made the arrangement with you for the opening of a credit account with these plaintiffs, the account here sued for, what was said between you and her in regard to whom credit was to be given for these goods?

Objected to and excluded.

Q. If the goods were charged to Mrs. Allen and they were delivered to her, how comes it they are charged to her husband for the purpose of this action?

Objected to; objection overruled and exception taken.

A. We open all accounts in our ledger in the name of the ladies—our dealings are exclusively with ladies; they come to me and open their accounts, giving their references, unless we previously know the standing of their husbands; when we don't know the husbands we ask for reference as to their standing.

Q. Reference as to the standing of their husbands? A. Yes.

Defendant's counsel objected on the ground that the custom of Arnold, Constable & Co. is incompetent, and does not render the defendant liable; custom must be universal. Admitted. Exception.

Q. In doing that, is it done for the purpose of charging the wife personally or charging the husband?

Objected to. Objection overruled and exception taken.

A. The custom is to render the account in their names, that is, to the ladies; our books will show that.

Objected to. Objection overruled and exception taken.

Q. In your course of dealing, to whom do you look for payment of these accounts? A. To the husband; we always send the bills to the husband.

Objected to. Admitted. Exception.

Arnold v. Allen, 9 Daly, 198.

The defendant's wife, whose testimony had been taken under a commission while she resided in another State, was called as a witness for plaintiff, and on cross-examination by defendant's counsel the commission was shown her, and she testified that the signature was hers. She was then asked (counsel reading from the commission and testimony): "Do you recollect this question being put to you on that commission: 'State fully any other matter which may be within your knowledge pertinent to the matters herein inquired of you.'" To the 26th interrogatory she says: "She expected to pay said bill of the plaintiffs when the defendant should return to her the sum of one thousand dollars, borrowed by him of her, and further to said interrogatory she said no. Did you testify to that?"

Objected to on the ground of irrelevancy and having no tendency to contradict anything the witness has sworn to in her examination in chief. Objection sustained. Exception taken.

Ira A. Allen, the defendant, whose wife had ultimately obtained a divorce from him under the Laws of Connecticut, was called as a witness in his own behalf, and testified on direct examination that the ground of the divorce was not cruelty. On cross-examination the witness was asked: "On what ground was that divorce obtained by her against you?"

Objected to as immaterial. Objection overruled and exception taken.

A. "Inhuman and cruel treatment."

He was subsequently asked: "When was the subject first brought up to get a divorce on the ground of violence on your part towards her?"

Objected to as immaterial. Objection overruled and exception taken.

A. "I do not know that we ever discussed that question of violence."

In the Marine Court at trial term plaintiff had a verdict, on which judgment was entered.

The General Term of the Marine Court reversed the judgment.

Arnold v. Allen, 9 Daly, 198.

The Court of Common Pleas reversed the judgment of General Term and affirmed that of the trial term.

J. F. DALY, J., [*on this point said*]: The exceptions to the rulings of the court as to evidence were not well taken. The plaintiffs were properly allowed to explain why the goods were charged on the books to the wife and not to the husband. The question as to whom credit is given by a tradesman is one of intent, and he may explain entries in his books, as well as his receipts, and similar writings, which *prima facie* contradict his assertions on the subject. The custom of the plaintiffs to enter in their ledger the names of the ladies who deal with them, but to send the bills to the husbands, was the explanation offered and properly received.

The objection that such custom must be *universal* was not tenable; plaintiffs were not attempting to prove a usage of a particular trade, but only to explain why Mrs. Allen's name instead of Mr. Allen's appeared on their books.

The defendant's counsel, on his cross-examination of the wife, read to her from the return to a commission (under which her evidence had been taken while she resided in another State) an answer she had made to one of the interrogatories, and asked her: "Did you testify to that?" Plaintiff objected, and the court sustained the objection. The objection was good.

The return to the commission showed what evidence she had there given, and unless defendant based some question material to the issue upon such evidence, it was improper to read her answers over and ask her if she had given them. Counsel for defendant had just previously asked a similar question, and had not followed it up by any other query. It was not too much of an assumption to suppose that he intended to prove her evidence under the commission in that way, which he had no right to do. The court did not rule out the interrogatories and answers in the return. If defendant wished to use them to impeach plaintiff, the proper course was to read them to the jury.

The defendant was asked, on cross-examination, on what grounds his wife obtained her divorce from him. This was objected to as *immaterial*, but not as *incompetent*. Testimony had been given on both sides as to alleged cruel treatment, and

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defendant on his direct examination had testified that there had been no cruelty. He also volunteered on the cross-examination, evidence about a negotiation between him and his wife for a divorce, and stated that it was ultimately obtained "under the laws of that State." It was within the scope of cross-examination to inquire whether it was a divorce for cruel treatment. The defendant answered that it was. The record would have been the best evidence on the point, but the objection to the query was not put on that ground.

These observations apply even more directly to the objection taken to a subsequent question: "When was the subject first brought up to get a divorce on the ground of violence on your part towards her?" for this would have helped to confirm the testimony of one or the other as to the date of the alleged cruel treatment.

People v. Webster, 139 N. Y., 73.

PEOPLE v. WEBSTER.

New York Court of Appeals, 1893.

[Reported in 139 N. Y., 73.]

A witness under cross-examination may be interrogated in regard to any vicious or criminal act of his life and compelled to answer, unless he claims his privilege.

This rule applies to a party in a criminal case who offers himself as a witness in his own behalf.

The extent to which disparaging questions not relevant to the issue may be put is in the discretion of the court.

It is not error to allow such questions against the objection that the answer may implicate another person.*

The existence of intimate and confidential relations between a witness who has testified and the party on whose behalf the witness was called, may be shown by the other party as matter of right, for bias is not a collateral question.

Testimony of the witness, drawn out on cross-examination tending to negative the acts and declarations relied on as showing bias, may be contradicted by the cross-examining counsel calling other witnesses.

A principal witness to the circumstances of the crime having been cross-examined as to her habitual use of opium, and whether she was under its influence at the time of the event she had observed, and, on re-direct having denied that she had once said she could not live without it, *Held*, that the question of the accuracy of her perceptions was material, and, the foundation having been laid, the cross-examining counsel could prove that she had said so.

The defendant was indicted September 23d, 1891, charged with the crime of murder, in the killing of Charles E. Goodwin.

Defendant admitted the act of homicide, but pleaded that it was justifiable on the ground of self-defence.

The deceased and the defendant occupied rooms upon the same floor of the Percival flat in 42d street, New York City. The deceased was unmarried: the defendant was cohabitating with a woman with whom a marriage ceremony had not been solemnized, but he claimed that a civil contract of marriage had been entered into between them in the month of January of the same year.

Upon the trial the defendant was called as a witness in his

People v. Webster, 139 N. Y., 73.

own behalf, and on his cross-examination the district attorney sought to show the unchaste character of his alleged wife and his illicit relations with her.

After examination at some length as to her occupation, the defendant was asked: Q. How did you think she was living on 39th street in a flat there on Sixth avenue?

Objected to; objection overruled and exception taken.

A. She told me that she had been sick and ill for some time.

* * * * *

Q. Did you have any interest in knowing how the woman was living whom you were going to take as your wife? A. I did not.

Q. Then didn't you find out when this actress had last played upon the stage? A. I never asked her.

Q. You didn't care, because you knew perfectly well that —. A. I loved her and wanted to make her my wife.

* * * * *

Q. And was not the suggestion of a common law marriage the suggestion of a lawyer to you, to help you in the trial, just as the suggestion of a civil marriage before the justice, and at the suggestion of your counsel? You told this jury you took as your wife in a common law way, or under the law of this state, a woman whose past history you did not care to inquire into, and as to how she was living, or how long without employment.

Objected to; objection overruled.

A. I met her and loved her. She told me she had been subjected to many temptations, and she might have succumbed to some. I told her we would forget the past and begin life anew. I thought too much of her to ask her.

* * * * *

Fanny Romaine was called as a witness on behalf of defendant, and on cross-examination testified as follows:

Q. Don't you remember that she told you, and complained to you, that if you didn't stop this intimacy, you as chambermaid, this intimacy with Mrs. Webster, staying in her room until four o'clock in the morning, that she would discharge you?

Defendant's counsel: I object to that as wholly immaterial,

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incompetent, and introduced for one unfair, obvious purpose." Objection overruled.

District Attorney: It is introduced for the purpose of showing the motives of this witness.

The Court: Objection overruled; it is not improper cross-examination.

A. I do not remember anything of the kind.

Q. What were you doing in Mrs. Webster's room—drinking opium? A. I was keeping her company.

Defendant's Counsel: Is this fair? I object to it.

Q. Was Mr. Webster there? The Court: I think I will allow it. Q. Was Mr. Webster there? A. No, sir. Q. Did Mrs. Webster used to come down into the servants' quarters in your room. A. I don't think I ever saw her there.

Defendant's Counsel: I object to it on the same ground that they objected to our proving against Goodwin.

The Court: This is cross-examination of a witness, asking her questions as to the intimacy with one of the parties interested in this transaction, and it is admissible, on the question of her credibility, and the motives she has in testifying.

Defendant's counsel excepts.

Q. Did you daily keep yourself under the influence of opium all the time that you were at the Percival Flats?

Defendant's Counsel: It is objected to, your Honor.

Objection overruled and exception taken.

A. I took opium at times, yes, sir.

* * * * *

Q. What connection was there between the former trial and your continuation in the service of Mrs. Webster?

Objected to. Objection overruled. Exception taken.

A. I was under bail with Mrs. Webster at that time.

Q. What connection was there with your continuing in her pay until the trial was over, and the next day there is no pay for you and you have to go to a home for friendless women?

Objected to as incompetent. Objection overruled. Exception taken.

A. I was under bail with Mrs. Webster at that time, and she was kind enough to give me a home until after the trial.

People v. Webster, 139 N. Y., 73.

The Court of Oyer and Terminer convicted defendant of the crime of manslaughter in the first degree.

The Supreme Court at General Term affirmed the judgment.

O'BRIEN, J.—The exceptions taken in the cross-examination of the defendant as a witness in his own behalf, with respect to his relations and conduct with Evelyn Granville prior to her marriage, were certainly within the discretion of the trial Judge, in view of the claim made that in resenting the insults offered to his wife he was justified in calling the deceased to account, and that the encounter with the deceased which resulted, and which placed defendant in apprehended danger of great bodily harm from the cuspidor in the hands of the deceased, justified the shooting as an act of self-defence.

Throughout the trial the prisoner placed great stress on establishing that the relation between him and Evelyn Granville was that of husband and wife, and it was, therefore, competent on the part of the People to show what in the beginning was the relation between these parties, in view of the admitted fact that no marriage ceremony had ever been performed between them prior to the shooting; and as the question was an open one whether or not it was a common-law marriage or a meretricious relation, the cross-examination of the defendant as to whether such relation was marital or meretricious was entirely proper.

[*As to witness Romaine.*] We think it clear that these matters upon which the witness was cross-examined were collateral matters, and that under the rule, by her answers given upon cross-examination, the people were bound. As said in *Stokes v. People* (53 N. Y., 176): "Upon cross-examination the prosecution had the right, for the purpose of impairing the credit of the witnesses, to ask questions as to those collateral matters, but having asked and obtained answers, must abide by the answers given; other witnesses could not be called to prove such answers untrue."

In *People v. Ware* (29 Hun, 473; aff'd 92 N. Y., 653) it is said: "The rule upon this subject has frequently been made a matter of consideration by the courts, and it is now well established that to entitle the party interrogating the witness in this

People v. Webster, 139 N. Y., 73.

manner, by way of cross-examination, to introduce evidence to contradict his statements, the cross-examination must be directed to a material inquiry in the case, or to evidence establishing a hostile or unfriendly bias against the party in the mind of the witness." (See also *Kirkpatrick v. N. Y. C. & H. R. R. Co.*, 79 N. Y., 243; *Chapman v. Brooks*, 31 N. Y., 87; *Carpenter v. Ward*, 30 N. Y., 243.)

We think this rule was violated by admitting this evidence to contradict Fanny Romaine on collateral matters, involving as it did, the questions whether she had or had not, weeks prior to the shooting,, slept in Mrs. Webster's apartment, and whether she had not, while she lived at the Percival, been in the habit of taking opium, and had not told Mrs. Wade that if she was deprived of the opium it would kill her.

The question, however, to be determined is, whether this was a prejudicial error. The criminal code requires (Sec. 542) that, "after hearing the appeal, the court must give judgment, without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties."

The court therefore affirmed the judgment.

The Court of Appeals affirmed the judgement.

MAYNARD, J. [*After stating facts, and ruling on other points.*] We do not think any error was committed in permitting the district attorney, upon cross-examination of the defendant, to show the circumstances under which he met the woman with whom he was living and the kind of life she was then leading. The questions were all within the range of a proper cross-examination. Their manifest purpose was to prove that his relations to this woman were unhallowed and adulterous in their origin; that their subsequent life together was that of libertine and mistress, and not of husband and wife, and that his word was, therefore, not entitled to the same weight as if his conduct had always been upright and blameless.

It is now an elementary rule that a witness may be specially interrogated upon cross-examination in regard to any vicious or criminal act of his life, and may be compelled to answer unless he claims his privilege. A party who offers himself as a witness in

People v. Webster, 139 N. Y., 73.

a criminal cause is not exempt from the operation of the rule. He is not compelled to testify, and if not examined the law provides that it shall not give rise to any presumption against him. When he elects to become a witness, it is for all the purposes for which a witness may be lawfully examined in the case, and he is not, in the constitutional sense, "compelled to be a witness against himself," although, when subjected to the test of a legitimate cross-examination, he may be required to make disclosures which tend to discredit or to incriminate him. (*People v. Tice*, 131 N. Y., 657). The extent to which disparaging questions, not relevant to the issue, may be put upon cross-examination, is discretionary with the trial court, and its rulings not subject to review here unless it appears that the discretion was abused. (*Great Western Turnpike Co. v. Loomis*, 32 N. Y., 127; *Greton v. Smith*, 33 *id.*, 245.)

It is urged that this evidence should have been excluded, because it tended to implicate the defendant's wife, who was a witness for him, and thus to impeach her in an unauthorized way before the jury. But any apprehended misuse of this species of evidence may always be avoided by asking and obtaining an instruction to the jury that it is only to be considered in determining the credibility of the witness who makes the confession.

The exception which remain to be considered relate to the evidence of the witness, Fannie Romaine. She was, ostensibly, in the employ of the proprietor of the flat, as a chambermaid, and in that capacity had no other duties to perform with reference to the occupants of the defendant's rooms, than pertained to the other rooms of the house. The prosecution sought to show that she had, in fact, become devotedly attached to the defendant and his wife, and was, at the time of the homicide, practically one of his household, and that their relations were intimate and confidential. We think the People were entitled to a submission of this proof, not as of a collateral, but as of an independent fact, and that the trial court properly allowed it to be so given. That such is the rule where the witness is hostile to the party against whom he is called cannot be questioned. As was said by Ch. J. EARL, in *People v. Brooks* (131 N. Y., 325), "The hostility of a witness towards a party against whom he is

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called, may be proven by any competent evidence. It may be shown by cross-examination of the witness, or witnesses may be called who can swear to facts showing it." (*Garnsey v. Rhodes*, 138 N. Y., 461.) The same rule must prevail where the relations of the witness and the party who produces him are more intimate and friendly than those which ordinarily exist in social or business intercourse. This kind of evidence is especially valuable in criminal prosecutions; for "there are no cases," says Wharton, "in which party sympathy, personal friendship, family affection operate, as a rule, so effectively as where life and liberty are at stake. In such cases, while (unless in the relationship of marriage, to be hereafter discussed) there is no exclusion on account of bias, however strong, bias is always of importance in determining credibility. Nor is this exclusively on the ground that bias prompts perjury. So it may sometimes do, but cases of this class are rare, while cases in which bias leads to unconscious perversion of facts are frequent. * * * For these reasons interest and party or social sympathy may be always shown in order to discredit a witness, and the same observation may be made as to near relationship." (Wharton *Crim. Ev.* § 376.)

In the pursuit of this line of proof, the People were permitted to show by the housekeeper of the flat, that this witness spent a great deal of the time in the company of defendant's wife; that she was her companion, and went out to dinner with her in that capacity, and that she stayed with her evenings, and as late as three o'clock in the morning. The housekeeper was then allowed, under objection, to state that on one occasion the witness, Romaine, had told her that she used to go with the defendant's wife to hunt up the defendant, and remain outside of a well known place of amusement two hours at a time, while defendant's wife was looking for him. The witness, Romaine, had denied upon her cross-examination that she had ever done so, or that she had ever so stated to the housekeeper. The evidence was properly allowed. It tended to contradict the Romaine woman as to a fact which was material in the case, and related directly to the intimacy of her associations with the defendant's family and the extent to which she was willing to serve them.

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The housekeeper was also allowed to state, under objection, that Miss Romaine, while employed in the Percival flats, was an habitual opium eater, and that she was many times under the influence of the drug, and that Miss Romaine had told her that she could not leave it off or she would go mad. The witness Romaine had admitted, upon her cross-examination, that she was in the habit of taking opium, and in reply to the question: "Were you under the influence of it on this particular night when this occurred?" She replied: "Not any more than any other time." She was asked if she had not told the housekeeper that if she gave up the use of opium, it would kill her. She denied having so stated, or that she had any conversation with her upon the subject. Upon re-direct examination, apparently for the purpose of excusing some discrepancies between her testimony on this trial and that given upon the examination before the police magistrate, the defendant's counsel asked her if she was not, at the time of the former examination, taking opium frequently, and she replied in the affirmative, and also stated that she was cured of the habit while in the hospital subsequently.

Under these circumstances we think the People were entitled to give independent proof of the extent to which this habit had control of her, and to contradict her testimony when she denied that she had stated that she was so addicted to the use of the drug at the time the homicide occurred that she could not live without it. She was one of the principal witnesses for the defense. She claimed to have been present when the defendant killed the deceased, and to have witnessed the entire occurrence, and to be able to give a minute description of the fatal encounter, and the value of her testimony depended largely upon the accuracy of her perceptions. If she was then under the influence of a powerful narcotic, whose well known properties are to distort the vision and induce mental confusion, it was material to show it: and her denial of the admission she made to the housekeeper was the denial of a material fact with respect to which she might be contradicted if the denial was untrue. It was not within the rule which concludes the cross-examining party by the answers of the witness.

Note on Bias against one not a party.

We are satisfied that no errors were committed on the trial to the prejudice of the defendant, and judgment of conviction must be affirmed.

All the judges concurred.

Judgment affirmed.

NOTE ON BIAS AGAINST ONE NOT A PARTY.

In *Garnsey v. Rhodes*, 138 N. Y., 461, an action upon a building contract, the defendant's contention was that the plaintiff and his architect colluded and conspired to alter the specifications, etc., or substitute others, to the defendant's prejudice. An employé of the architects, one King, was called by defendants to testify in support of this contention.

MAYNARD, J., said: "We also think it was error to sustain the objections of the defendant to the questions put to the witness King, on cross-examination, in which he was asked whether there had been any disagreement between him and the architects; or whether he left their employ in consequence of a disagreement; or whether when he left it was with friendly feelings towards them, and whether his relations with them were then friendly. This was the principal witness for the defendant to establish the alleged conspiracy. He was at the time employed as a draughtsman in the office of the architects, and testified to transactions between them and the plaintiff tending to show the collusion which the referee found. A few months after he left their employ, and we think it was competent for plaintiff to prove, if he could, that the witness was unfriendly to the architects. The object of the defense was to charge the plaintiff with the consequences of a conspiracy between him and the architects, and it was, therefore, quite as material and important for the plaintiff to show that the witness by whom it was sought to establish the unlawful combination was hostile to one of the parties to it as it would have been to have shown hostility on his part towards the plaintiff himself. The admission or rejection of the evidence was not discretionary with the trial court. It is a material fact which may be proved by any competent evidence, as was held by this court in *People v. Brooks* (131 N. Y., 321). It was not there held, as the counsel for the defendant seems to suggest, that it was in the discretion of the court, whether such questions should be allowed. All that was said upon the point was that the extent to which such an examination may go must be in some measure within the discretion of the trial judge. This must be so or else it might become interminable.

"But here the whole inquiry was ruled out. Even general questions were disallowed, and, as it must be assumed, for the purposes of this appeal, that if answered, the responses would have shown bias, the plaintiff may have been prejudiced by the exclusion of the evidence."

NOTE ON RECENT CASES ON CROSS-EXAMINING AS TO BIAS.

Alabama: *Salm v. State*, 89 Ala., 56; s. c. 8 Southern Rep., 66 (on cross-examination it is error not to allow a witness to be questioned as to facts showing an unfriendliness to the party against whom he testifies; as that the witness had procured a warrant to be sworn out charging such party with a criminal offense). *California*: *People v. Gillis*, 97 Cal., 542; s. c. 32 Pacific Rep., 586 (in a criminal prosecution it is error to refuse to allow the prosecuting witness to be asked on cross-examination whether he had not employed an attorney who was assisting in the prosecution). *Anderson v. Black*, 70 Cal., 226; s. c. 11 Pacific Rep., 700 (in ejectment, one of the plaintiffs as witness was asked on cross-examination if he had not on a certain night gone with a shotgun upon the premises while defendants were in possession and forcibly dispossessed them. *Held*, that it was improper to exclude such question, but that its exclusion was not reversible error, as the witness had previously admitted hostility). *People v. Thomson*, 92 Cal., 506; s. c. 28 Pacific Rep., 589 (upon a trial for murder it was held error not to allow defendant, on cross-examination, to ask a witness who testified in chief that in going to the scene of the homicide he took his rifle with him, why he took the rifle with him, where, under the circumstances, the taking of the rifle by the witness might have been actuated by his hostility to defendant). *Colorado*: *Stewart v. Kindel*, 15 Colo., 539; s. c. 25 Pacific Rep., 990 (an admission of hostility by a witness does not preclude his cross-examination as to the extent of the ill feeling and the character of such prejudice). *Indiana*: *Hinchcliffe v. Koontz*, 121 Ind., 422; s. c. 23 Northeast. Rep., 271 (it is discretionary with the Court to limit cross-examination to show a witness' bias). *Sage v. State*, 127 Ind., 15; s. c. 26 Northeast. Rep., 667 (defendant's witness may properly be asked, on cross-examination, if he did not leave home in order to enable the defendant to obtain a continuance). *Robertson v. McPherson*, 4 Ind. App., 595; s. c. 31 Northeast. Rep., 478 (a defendant may ask on cross-examination if witness did not say that he and others were going to keep up law suits against defendant until they broke him up). *Louisiana*: *State v. McFarlain*, 41 La. Ann., 686; s. c. 6 Southern Rep., 728 (it is error not to permit the accused to question a State witness as to his particular acts of hostility against him, such as the witness' attempt to induce a crowd to lynch the accused shortly after the offense). *Missouri*: *State v. Turlington*, 102 Mo., 642; s. c. 15 Southwest. Rep., 141 (upon a trial for murder it was held competent for the State to introduce a letter written by witness to the defendant in order to show that the witness sympathized with him; if the letter contained anything prejudicial to the defendant, a proper precautionary instruction to the jury could have been requested). *Nebraska*: *Consaul v. Sheldon*, 35 Neb., 247; s. c. 52 Northwest. Rep., 1104 (it is discretionary with the trial court to limit cross-examination as to bias, and it is not error not to allow defendant to cross-examine a wit-

Note on Recent Cases on Cross-examining as to Bias.

ness as to his ill feeling towards him more than three years before the trial, where the witness had admitted that he had felt unfriendly toward defendant, but disclaimed any present ill feeling). *New York: Lustig v. N. Y., Lake Erie, etc., R. Co.*, 65 Hun, 547; s. c. 20 N. Y. Supp., 477 (where a witness on cross-examination denied any interest in the case, it was held within the discretion of the court to refuse to allow further cross-examination in reference thereto). *Garnsey v. Rhodes*, 138 N. Y., 461; s. c. 34 Northeast. Rep., 199 (it is proper on cross-examination to show that a witness who has given material evidence is hostile to one of the parties; and while it is in some measure in the discretion of the court how far the examination shall go, it is not within its discretion to refuse to allow any examination in relation thereto, and the exclusion of all such testimony is error). *Cambias v. Third Ave. R. Co.*, 1 Misc. R., 158; s. c. 20 N. Y. Supp., 633 (in an action for personal injuries defendant's witness, on cross-examination, may be asked whether he had not offered plaintiff money to settle). *Strawbridge v. Vandenburg*, 10 N. Y. Supp., 610 (it is error not to allow plaintiff, as a witness, to be asked on cross-examination whether he was the sole owner of the claim sued on). *Oregon: State v. Olds*, 18 Oreg., 440; s. c. 22 Pacific Rep., 940 (in a criminal case the State has a right to cross-examine the defendant's witness as to anything that would show interest in the result of the trial, and anything he did in aid of defendant about the trial). *State v. Jarvis*, 18 Oreg., 360; s. c. 23 Pacific Rep., 251 (evidence of witnesses' declarations to show bias cannot be regarded as evidence in support of the facts in issue).

Great Western Turnpike Co. v. Loomis, 32 N. Y., 127.

GREAT WESTERN TURNPIKE CO. v. LOOMIS.

New York Court of Appeals, 1865.

[Reported in 32 N. Y., 127.]

Disparaging questions, put on cross-examination, if not relevant to the issue, may be excluded in the discretion of the judge, though put for the avowed purpose of impairing credibility. The party, who called the witness, may object. It is not necessary to put the witness to his claim of privilege.

Plaintiff sued in a justice's court to recover fifty cents toll money.

On the trial plaintiff's gatekeeper was called as a witness for plaintiff, and testified that the defendant passed over plaintiff's road and through the gate in question twice and refused to pay toll.

On cross-examination he was asked: "Have you collected or attempted to collect legal toll twice over or more of the same individuals for one passing through the gate?"

Objected to as immaterial. Objection sustained.

The same question was then asked for the purpose of impeaching the witness' credibility.

Same objection and ruling.

Q. Have you ever collected or attempted to collect toll of people who are not liable to pay toll?

Same objection and ruling.

A. I have been instructed to detain persons until they paid their legal toll."

The Justice gave judgment for plaintiff.

The Madison County Court reversed the judgment, holding that the questions were competent for the purpose offered, viz.: to impeach the credit of the witness; and although he might have claimed the privilege of refusing to answer, the party could not object, and it was error to exclude the questions upon such objection.

The Supreme Court affirmed the judgment of the county

court, saying that if the gatekeeper had been permitted to answer the questions put to him and he had answered them in the affirmative, without any explanation more favorable to himself than direct affirmative answers would imply, such answers would have affected his credibility as a witness. We held in the *People v. Blakely* (see 4 vol. Parker's Criminal Reports), that counsel have the right to put question to witnesses on cross-examination in regard to their own conduct to affect their credibility, which, if answered in the affirmative, would have such effect, and that the court could not in its discretion refuse to allow such questions to be put.

The Court of Appeals reversed the judgment of the Supreme and County courts, and affirmed that of the justice.

PORTER, J. If the judgment of the court below be upheld by the sanction of this tribunal it will embody in our system of jurisprudence a rule fraught with infinite mischief. It will subject every witness who, in obedience to the mandate of the law, enters a court of justice to testify on an issue in which he has no concern, to irresponsible accusation and inquisition in respect to every transaction of his life affecting his honor as a man or his character as a citizen.

It has heretofore been understood that the range of irrelevant inquiry, for the purpose of degrading a witness, was subject to the control of the presiding judge; who was bound to permit such inquiry when it seemed to him, in the exercise of a sound discretion, that it would promote the ends of justice, and to exclude it when it seemed unjust to the witness and uncalled for by the circumstances of the case.

The judgment now under review was rendered on the assumption that it is the absolute legal right of a litigant to assail the character of every adverse witness, to subject him to degrading inquiries, to make inquisition into his life, and drive him to take shelter under his privilege or to self vindication from unworthy imputations wholly foreign to the issue on which he is called to testify.

The practical effect of such a rule would be, to make every witness dependent on the forbearance of adverse counsel for that

protection from personal indignity which has been hitherto secured from the courts, unless the circumstances of the particular case made collateral inquiries appropriate. This rule, if established, will be applicable to every tribunal having original jurisdiction. It will perhaps operate most oppressively in trials before inferior magistrates, where the parties appear in person, or are represented by those who are free from a sense of professional responsibility. But it may well be questioned whether, even in our courts of record, it would be safe or wise to withdraw the control of irrelevant inquiry from the judge and commit it to the discretion of adverse counsel. The interposition of the court has often been necessary to protect witnesses from the vigor of examinations conducted on the supposition that they were entitled to such protection. When this power of protection is withdrawn, is it to be expected that counsel, deeply enlisted for their clients and zealous to maintain their rights, would feel bound to exercise toward witnesses a forbearance which the courts themselves refuse? There is much diversity of opinion, even among eminent members of the profession, as to the measure of obligation imposed upon counsel by the implied pledge of fidelity to the client. This could not be more strikingly illustrated than by the atrocious, but memorable, declaration of one of the leading lawyers of England, on the trial of Queen Caroline: "that an advocate, by the sacred duty which he owes his client, knows, in the discharge of that office, but one person in the world—that client, and none other. To save that client by all expedient means; to protect that client, at all hazards and cost to all others, and, among others, to himself, is the highest and most unquestioned of his duties, and he must not regard the alarm, the suffering, the torment, the destruction which he may bring upon any other." (1 Brougham's speeches, 63.) Such a proposition shocks the moral sense, but it illustrates the impolicy of divesting the presiding judge of the power to protect witnesses from irrelevant assault and inquisition. From the nature of the case, he is in a position and frame of mind more favorable than that of counsel to arrive at a safe and impartial conclusion. The balance of justice should be held as steady and even between the witness and the parties as between the opposing litigants, and

the rights of neither should be committed to the absolute discretion of counsel.

It is believed that the practice on this subject which has heretofore prevailed in this state rests on sound principle and is abundantly fortified by authority. Its propriety seems to have been always recognized in the English courts, and the judges have never hesitated at *nisi prius* to exercise a liberal discretion in the admission or exclusion of irrelevant inquiries tending to degrade the witness, according to the varying circumstances under which the offer was made.

No better illustration of this can readily be found than is furnished by a comparison of three of the reported decisions of Lord Ellenborough, "that great master of the law of evidence," as he is designated by Phillips and Roscoe. In the case of *Frost v. Halloway*, the bearing of the witness was such that he not only permitted an inquiry whether he had not been tried for theft, but threatened to commit him if he refused to answer the question. (1 Phillips, Cowen & Hill's ed., 283, note.) In the case of *Millman v. Tucker*, when a witness was asked by Lord Erskine if he had not been imprisoned for forgery, he gave permission to the witness to answer the question if he felt it due to himself, but advised him not to do so, and declared that if he himself had been asked such a question he should have refused to answer, "for the sake of the justice to the country and to prevent such an examination." (Peak's Additional Cases, 222.) In the case of *Rex v. Lewis*, the prosecutor was asked on cross-examination if he had not been in the house of correction. Lord Ellenborough at once interposed and prohibited the inquiry, on the ground that witnesses engaged in the discharge of a legal duty should not be subjected to improper investigation. (4 Espinasse, 226.)

In the leading case of *Spencely v. De Willet*, as in the case at bar, the disparaging question was overruled, without any objection by the witness or any claim of privilege. In that case, as in this, the avowed object of the defendant's counsel was to discredit the witness. The defendant's counsel declared it to be their purpose to avail themselves of the answer if affirmative, and, if negative, to contradict the witness. Lord Ellenborough excluded the question, on the ground that it called for an answer which, if

affirmative, would be irrelevant, and, if negative, would not be opened to contradiction. At his instance, for the purpose of setting the practice at rest, the decision was reviewed on bill of exceptions, and the exclusion of the question was sustained by all the judges. (7 East, 108.)

Since that decision we find no case in the English courts in which a new trial has been granted for the exclusion of disparaging questions irrelevant to the issue; though since that time, as before, the judges at *nisi prius* have continued to exercise their discretion by permitting such collateral inquiries when the ends of justice seemed to demand it, and in all other cases excluding them in justice to the witnesses. The existing rule on that subject in England is, undoubtedly, that stated in the note subjoined to the report of the case of *Rex v. Pitcher*: "In practice, the asking of questions to degrade the witness is regulated by the discretion of the learned judge in each particular case. (1 Carr & Payne, 85.) Such has been the practice in this state hitherto, and it has received the sanction of the General Term in the fifth judicial district, in the case of the present plaintiff against Phillips, which was precisely similar to that now under review.

The judgment in the present case was rendered on the authority of a recent decision in the sixth judicial district, in the case of the *People v. Blakely* (4 Parker, 176). That is the only case found in our state reports in which a judgment has been reversed on the ground of the exclusion of inquiries as to particular transactions, tending to degrade the witness, but wholly irrelevant to the issue. A careful and deliberate examination of the question, aided by the learned and able opinion delivered in that case, has failed to bring us to a conclusion in harmony with that of the court below.

Much confusion and conflict in the treatment of this subject is apparent in the English text-books, as well as our own. This is mainly due to the fact, that the question usually arises only at *nisi prius*. The rulings of the judges in different cases, being on a mere question of practice at the trial, are not the subject of review, and are necessarily acquiesced in by the parties. The decisions, in these as in all other cases, resting in mere discretion,

have been, of course, inharmonious, according to the views of different judges and the varying circumstances of the cases in which the question was presented. The text writers, as well as the judges, differ in their views as to the rules which should control the exercise of this discretion ; some being predisposed in favor of the liberal allowance of irrelevant crimination and others preferring the practice of rigid exclusion.

Thus, two writers, as acute and discriminating as Roscoe and Peak, cite respectively the case of Yewin, in 2 Campbell, and that of Spenceley v. DeWillott, in 7 East, as authority for propositions in apparent antagonism. Roscoe regards those cases as establishing the rule, "that questions not relevant may be put to the witness for the purpose of trying his credibility." (Roscoe's Crim. Ev., 181.) Peak quotes the same cases as superseding his elaborate discussion, in the text of the first edition of his work, as to the right to put such questions, and adds, that "as it may now be considered as settled, that matters wholly foreign to the cause cannot be inquired into from the purpose himself, those arguments are now reprinted in the appendix." (Norris's Peak, 204.) But when we reflect that both authors in what they wrote, had in view the existing practice of England, by which the limits of collateral examination were under the control of the presiding judge, the seeming conflict disappears and their respective conclusions harmonize with each other, and with the cases on which they rest. It is entirely true, as affirmed by Roscoe, that inquiries on irrelevant topics to discredit the witness, may be permitted on the trial in the discretion of the judge ; and equally true, as affirmed by Peak, that such inquiries may be excluded without infringing any legal right of the parties. The writers on evidence have endeavored to aid the courts in the exercise of this discretion, with such results as they supposed to be deducible from the various decisions at *nisi prius* ; but from the nature of the case, no fixed rule could be devised, defining the right and limiting the extent of irrelevant inquiry, which would be just or safe in universal application.

The opinion in the case of the People v. Blakely rests mainly on prior decisions in our own courts, which, when examined and classified do not seem to us to uphold the present judgment.

In several of the cases cited, the question did not arise. In one of them, the discrediting evidence was received, and its admission was held to be no ground for reversal. (Howard City Fire Insurance Co., 4 Denio, 502.) In another, the witness answered the disparaging questions; and a new trial was granted, on the ground that a party calling him should have been permitted to give general evidence in support of his character for truth. (The People v. Rector, 19 Wend., 569.) In a third, the witness claimed his privilege; the judge held that he was not bound to answer and the court sustained his decision. (The People v. Mather, 4 Wend., 229.) In four of the cases cited, the exclusion of the discrediting evidence was held to be erroneous. In neither of them did the witness claim his privilege. In each, the proof offered and rejected was adjudged to be material and relevant to the issue. (Jackson v. Humphrey, 1 Johns, 498; Southard v. Rexford, 6 Cow., 234; the People v. Abbott, 19 Wend., 192; the People v. Bodine, 1 Denio, 281.)

None of these decisions tend to sustain the proposition that the exclusion of inquiries as to particular transactions, wholly irrelevant to the issue, for the purpose of degrading the witness is cause for reversal by any appellate tribunal.

That the witness was under no obligation to answer the questions propounded in the case at bar, is settled by the decision of this court in the case of Lohman v. The People. It is there expressly adjudged that the party is not entitled to an answer to an inquiry tending to disgrace the witness *unless the evidence would bear directly upon the issue*. (1 N. Y., 380, 385.)

If, therefore, the defendant in this case had any cause of complaint, it was not that he was deprived of an answer to which he was entitled in law, but that he was deprived of the benefit of an irrelevant fact, the truth of which does not appear, and which, if true, the witness was under no obligation to disclose. The office of a court of review is to correct errors in law, prejudicial to the appellant. If the answer was not matter of legal right, the question could properly be excluded unless it was relevant to the issue.

But it is said that as the question tended to degrade the witness he alone could take the objection. Strictly speaking, there is no

case in which a witness is at liberty to object to a question. That is the office of the party or the court. The right of the witness to decline an answer if the court sustains his claim of privilege. When the question is relevant, it cannot be excluded on the objection of the party, and the witness is free to assert or to waive his privilege. But when the question is irrelevant, the objection properly proceeds from the party, and the witness has no concern in the matter unless it be overruled by the judge. The precise issue is, whether the court before which the cause is tried is authorized, in the exercise of a sound discretion, to exclude inquiries as to particular transactions irrelevant to the issue, and tending to degrade the witness, on the objection of the party, without putting the witness to his election. On this point we understand the decision in the case of *Ward v. The People* to be controlling and decisive. Ward was indicted for larceny. On the trial, the prosecutor was asked in the course of his cross-examination, whether he had not himself stolen the property, which he alleged to have been stolen from him by the prisoner. The question was excluded on the objection of the district attorney. The conviction was sustained in the Supreme Court, on the ground that if the question had been permitted the witness would not have been bound to answer it, and even if it had been answered affirmatively the fact would have been immaterial to the main issue. (3 Hill, 395.) The court of errors affirmed the judgment on the specific ground, that though the witness had not claimed his privilege, the objection was properly sustained as the inquiry was irrelevant to the issue. (6 Hill, 144, 146.)

Every court having original jurisdiction is authorized to reject evidence on immaterial issues, though objected to by neither party; and if it were otherwise it would be a reproach to the administration of justice. (*Corning v. Corning*, 2 Seld., 97; *The People v. Lohman*, 2 Barb., 221.)

If, however, the question were *res nova*, we should have no difficulty in arriving at the same conclusion. The practice which has heretofore prevailed in this respect has been satisfactory to the community, the bench and the bar. Questions of this nature can be determined nowhere more safely or more justly than in the tribunal before which the examination is conducted. Justice

to the witness demands that the court to which he appeals for present protection shall have power to shield him from indignity, unless the circumstances of the case are such that he cannot fairly invoke that protection. If the range of irrelevant inquisition be committed to the discretion of adverse counsel, it will be no reparation of the wrong to the witness, that the judgment in which he has no concern may be afterward reversed by an appellate tribunal.

It often happens that *leading questions* become appropriate in the course of a direct examination, in eliciting from hostile or unwilling witnesses facts material to the issue. It happens often, too, that the appearance and deportment of an adverse witness—his prevarications, reluctance, apparent bias—the intrinsic improbability of his testimony, or its incongruity with known facts—make it the plain duty of the court to permit searching and disparaging inquiries on matters irrelevant to the issue, for the purpose of aiding the jury in a collateral inquiry as to his credit. In each of these, as in other like cases, involving mere questions of practice, order and decorum, the right and the duty of decision are wisely committed, in this state, as in England, to the sound discretion of the court in which the trial is conducted. Unless there be a plain abuse of discretion, decisions of this nature are not subject to review or appeal.

The proposition that no witness has a right to complain of an opportunity to vindicate his integrity by his own oath is plausible and specious, but illusory. It ignores the indignity of a degrading imputation, when there is nothing in the circumstances of the case to justify it. It ignores, too, the humiliation of public arraignment by an irresponsible accuser, misled by an angry client, and shielded by professional privilege. Few men of character, or women of honor, could suppress, even on the witness stand, the spirit of just resentment which such an examination on points alien to the case, would naturally tend to arouse. The indignation with which sudden and unworthy imputations are repelled, often leads to injurious misconstruction. A question, which it is alike degrading to answer or decline to answer, should never be put, unless, in the judgment of the court, it is likely to promote the ends of justice. A rule which would

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license indiscriminate assaults on private character, under the forms of law would contribute little to the development of truth, and still less to the furtherance of justice. It would tend neither to elevate the dignity of our tribunals, nor to inspire reverence for our system of jurisprudence.

In the case now under review, there was no conflict in the evidence. The witness was neither a stranger nor a volunteer. The facts to which he testified were not only probable in their nature, but within the personal knowledge of the party against whom he was called. No attempt was made to contradict him. There was nothing in his testimony or the relations he sustained to the parties, to deprive him of the benefit of the ordinary presumptions in favor of good character and good faith. If the disparaging questions had all been answered in the affirmative, the jury would not have been justified in discrediting his evidence on the facts material to the issue. But they were wholly irrelevant and were properly excluded on the trial.

The judgment of the Supreme Court and the County Court should be reversed with costs, and the original judgment should be affirmed, with an order for restitution.

All the judges concurred.

Judgment affirmed.

SPIEGEL v. HAYS.

New York Court of Appeals, 1889.

[Reported in 118 N. Y., 660.]

The fact that a witness has been convicted of crime can be shown by his cross-examination.

At common law this cannot be done against objection that the record is the best evidence; but under the statute (N. Y. Penal Code, § 714; N. Y. Civ. Pro., § 832) conviction may be proved, either by the record or his cross-examination.

The witness on such a cross-examination may be asked whether he has been convicted of a crime, and so also whether he has been imprisoned upon conviction, or whether he has committed a crime [subject to his privilege against self-crimination]; but *it seems*, he cannot be asked merely whether he has been arrested or indicted, for this is not evidence of guilt.

Replevin for property claimed by plaintiff under a bill of sale

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from one Samuels. Defendants sought to justify their taking under an attachment against Samuels, claiming that the sale to plaintiff was fraudulent and void, as to the creditors of the vendor.

On the trial Louis Behrman was called as a witness by the defendant, and gave material testimony against plaintiff.

On cross-examination he was asked by plaintiff's attorney: Q. "How long is it since you have been out of prison? A. Nine or ten years.

Q. What were you convicted of?

Objected to by defendant. Exception.

The Witness: Your Honor, must I answer that question?

The Court: Yes. A. I was convicted for breaking open a door and taking some bundles which belonged to my brother.

Q. Convicted for grand larceny, weren't you? A. I don't know for what I was convicted, but I know that much. My brother is Bernard Behrman, in the old country.

Q. Weren't you convicted of grand larceny in January, 1878, at the residence of Philip Kraft, by breaking into the drawer of a table and stealing therefrom a sum of money, at least, thirty marks?

Objected to. Objection overruled. Exception taken.

A. No, sir; not as I know; I don't recollect.

Q. All you recollect is that you were convicted of what?

Objected to. Objection overruled. Exception.

A. Breaking in a barn door and taking bundles away."

Judgment entered for plaintiff.

The City Court of Brooklyn at General Term affirmed the judgment without opinion on this point.

The Court of Appeals affirmed the judgment.

POTTER, J. [*after passing on an exception to the charge, said*]: There is another question, which is presented by exceptions, and that relates to the questions which were asked the witness Behrman, who had been called by the defendant and had given material and damaging testimony to the plaintiff, if believed by the jury. He was asked upon his cross-examination, after he

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answered without objection, how long since he had been out of prison: "What were you convicted of?" This question was objected to generally, and the witness appealed to the court if he must answer the question, and was answered, "Yes" by the court. Thereupon the witness answered, "I was convicted for breaking open a door and taking some bundles which belonged to my brother."

Further on, in the course of his cross-examination, the witness was asked of what he had been convicted, in respect to another transaction, and, after a general objection to the question, he answered: "Breaking in a barn door and taking bundles away." These answers showed that the witness had been convicted of a crime. As Sec. 714 Penal Code, permits that it may be shown by a cross-examination of the witness that he has been convicted of a crime without the production of the record of his conviction, the question is simply whether a conviction of a witness, of a crime, may be shown for the purpose of discrediting his evidence.

That the jury may and should give proper consideration and weight to evidence, showing that the witness has committed crime, is beyond question (*Real v. People*, 42 N. Y., 270-280; *The People v. Noelka*, 94 N. Y., 137; *The People v. Irving*, 95 N. Y., 541; *Ryan v. The People*, 79 N. Y., 598).

The apparent conflict in some of the cases, in respect to this mode of discrediting witnesses, has arisen from the mode of proving the discrediting fact.

It had been held before the penal code that it is not competent to show by a cross-examination of the witness himself that he had been convicted of a crime, if the objection was made that the record of the conviction is the best evidence (*Newcomb v. Griswold*, 24 N. Y., 298; *Real v. People*, 42 N. Y., 286). Such objection being no longer available, you may show upon the cross-examination of the witness himself, that he has been convicted of a crime, or that he had been imprisoned upon the conviction of a crime or that he had committed a crime (*The People v. Irving*, 95 N. Y., 541; *The People v. Noelke*, 94 N. Y., 137-144; *Real v. The People*, 42 N. Y., 280).

The courts have repeatedly held that it does not prove that a

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witness *has been guilty of a crime*, to prove he has been arrested upon the charge of a crime or that he has been indicted for a crime (People v. Crespo, 76 N. Y., 288; People v. Brown, 72 N. Y., 571; The People v. Irving, 95 N. Y., 544; Smith v. Mulford, 42 Hun, 347).

We do not perceive that any error was committed upon the trial and the judgment should be affirmed, with costs.

Friess v. New York Central, etc., R. R. Co., 67 Hun, 205.

FRIESS v. NEW YORK CENTRAL AND HUDSON
RIVER R. R. Co.*New York Supreme Court, 1893.*

[Reported in 67 Hun, 205.]

Where it reasonably appears that the answer to a question will have a tendency to expose the witness to a criminal charge, he is not bound to answer.

He may be protected without being required to explain how he might be criminated.

When the court can perceive that such a question would have such a tendency, its duty is to inform the witness of his privilege and sustain him in declining to answer. It is only where the question does not disclose ground for apprehension, that the party is entitled to have the ground of the privilege stated by the witness, at least sufficiently to show that the answer may fairly tend to criminate him.

Where the privilege of the witness is sustained, the refusal cannot be commented on by counsel, nor considered by the jury in weighing the testimony.

Plaintiff sued for damages for personal injuries by catching his foot in a frog maintained by the defendant on its track in the sidewalk of a city street, crossed by the track. The defendant contended and introduced evidence to show that the plaintiff was stealing a ride at the time of the accident, and that his injuries resulted from his falling from the train and being run over by the cars.

One of the witnesses who was called and testified on behalf of the plaintiff was a young woman.

Defendant's counsel in the course of her cross-examination interrogated her as to her having sworn out a warrant charging a man with having committed a rape on her; as to having seen the district attorney and sheriff; and as to having seen a couple of other men. She was then further examined as follows:

"Q. A couple of other men who said that they had been familiar with you at that time?

Objected to as incompetent, immaterial and improper. Objection sustained.

Friess v. New York Central, etc., R. R. Co., 67 Hun, 205.

Q. At that time there, in the presence of District Attorney Hancock and Mr. O'Neil here, did you admit that it was not true that Mr. De Rusha had committed a rape upon you, and that you had sworn falsely when you charged him with it?

Objected to as incompetent; immaterial and improper.

The Court: You may answer it if you like, you are not obliged to answer it unless you see fit. Do you decline to answer? A. No, sir.

Q. Do you want to answer? A. No, sir.

By Defendant's Counsel: Q. You decline to answer that question, do you? You refuse to answer that question, do you? A. Yes, sir.

Q. Subsequently this proceeding against this man was dropped?

Objected to as incompetent. Objection sustained.

Defendant's Counsel: Your honor holds that she can refuse to answer whether she has admitted committing perjury or not?

The Court: Yes.

Exception for defendant.

By Defendant's Counsel: Q. Do you refuse to answer that question, whether you admitted then committing perjury, upon the ground that it would disgrace you to answer the question?

Objected to as incompetent.

The Court: I don't think that is proper.

Exception for defendant.

By Defendant's Counsel: Do you refuse to answer that question upon the ground that it would be confessing the commission by you of a crime?

Same objection, sustained. Exception taken.

The Court: I am wrong perhaps in these rulings, and I will recall both of these last rulings. The plaintiff is not in a position to object to her being asked these questions. I overrule the objections to both questions, and instruct the witness she may answer them or not, as she sees fit.

Exception for defendant.

(Question read.) Do you refuse to answer that question whether you admitted then committing perjury upon the ground that it would disgrace you to answer the question?

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The Court: You may answer that or not, as you see fit. Do you want to answer that question? A. No, sir.

(Question read.) Do you refuse to answer that question upon the ground that it would be confessing the commission by you of a crime?

By the Court: Do you want to answer that question? A. No, sir.

Exception taken to each ruling.

By Defendant's Counsel: Q. Now, I ask you to state here any reason why you decline to answer that question, whether you admitted at that time committing perjury?

The Court: Q. What do you answer to the question? Do you understand the question? A. Yes, sir.

Q. Do you want to answer that? A. No, sir.

Q. You don't want to answer that; you don't want to state any reason? A. No, sir.

Defendant's Counsel: I ask the court separately to instruct her to answer each of those questions.

The Court: I decline to instruct her that she must answer them; I decline to compel her to answer them.

Exception taken.

At Circuit Court plaintiff recovered.

The Supreme Court at General Term affirmed the judgment.

MARTIN, J. [*after stating facts*, said on this point]: It is an old and well established principle of the law of evidence that where it reasonably appears that the answer to a question will have a tendency to expose a witness to a criminal charge, he is not bound to answer. This is so, even where the fact in regard to which he is interrogated forms but a link in the chain of testimony which would convict him, and he is protected without being required to explain how he might be criminated by the answer.

In respect to this claim of privilege, there are two extremes which ought equally to be avoided: First, That of requiring from a witness, who has honestly claimed the privilege, any explanation whatever of his reason for refusing to answer, if the court can see how such answer may fairly and reasonably tend

Friess v. New York Central, etc., R. R. Co., 67 Hun, 205.

to criminate him; and, second, That of permitting a witness to interpose the shield of apprehended peril as a protection against every question which he is disinclined to answer, although there be nothing in the circumstances of the case which, in the least, suggests the danger. (*Youngs v. Youngs*, 5 Redf., 506; *People v. Mather*, 4 Wend., 232.)

Whether an answer may tend to criminate a witness is a point which the court may determine, under all the circumstances of the case when the protection is plain, without requiring the witness to explain how the effect is to be produced. In cases of this kind, the court must see, from the circumstances and nature of the evidence which the witness is called upon to give, that reasonable grounds exist for apprehending danger to the witness from being compelled to answer. (*Taylor on Ev.*, § 1457.)

It is said, however, in *New v. Fisher* (11 Daly, 313): "Where the answer to a question may tend to criminate or degrade a witness, it is, undoubtedly, the privilege and duty of the court to instruct the witness as to his legal rights, and the witness then has the right to claim his privilege; but the party seeking the evidence has the right to make the witness claim his privilege, and to [require] the statement by the witness that he refuses to answer because the answer may incriminate or degrade him."

We seriously doubt the correctness of this rule. We are of the opinion that when the court can perceive that a question put to the witness would have a tendency to criminate him, it is its duty to inform the witness of his privilege, and to sustain him in declining to answer. It may be that where a question propounded does not disclose any ground for apprehension, that the party may be entitled to have the ground of the privilege stated by the witness, at least sufficiently to enable the court to see how the answer might fairly and reasonably tend to criminate him. Surely no such necessity existed in this case, as the question put to the witness was whether she had admitted committing perjury. That this would tend to convict her of that crime was readily seen and clearly understood by the trial court, and must also have been equally understood by the defendant.

Moreover, if the rule is as claimed by the defendant, and as held in the *New* case (*supra*) still, we are unable to discover

 Note of Recent Cases, Privilege against Crimination.

in the rulings of the trial court, anything that would justify a reversal of the judgment. From the claim of such privilege and its allowance, no inference whatever could be legitimately drawn affecting either party. (*Phelan v. Kenderdine*, 20 Penn. St., 354.) Nor could the fact of such refusal have been commented on by counsel, or taken into consideration by the jury in determining the weight to be given to the witness' testimony. (*Rose v. Blakemore Ry. and M.*, 382; *Rex v. Watson*, 2 Starkie, 158; *Lloyd v. Passingham*, 16 Ves. Jun., 59; *Carne v. Litchfield*, 2 Mich., 340; *Foster v. People*, 18 *id.*, 273; *People v. Maunusau*, 60 *id.*, 15.) If the court had compelled the witness to specify the ground on which she claimed her privilege, it would not have legitimately aided the defendant. Therefore, if the rulings were erroneous, the error was harmless, and not prejudicial to any of the defendant's legal rights.

NOTE ON THE PRIVILEGE AGAINST SELF-CRIMINATION AS AFFECTED BY STATUTES FORBIDDING USE OF THE EVIDENCE TO CRIMINATE.

Whether the existence of a statute providing that a witness' testimony which tends to criminate him cannot be used in any prosecution against him for the offense removes the privilege, is disputed.

Affirmative, *People v. Kelly*, 24 N. Y., 74; *Gilpen v. Daly*, 59 Hun, 413.

Negative, *Counselman v. Hitchcock*, 142 U. S., 547.

The privilege extends to the production of documents, *Boyd v. United States*, 116 U. S., 616.

NOTE OF RECENT CASES, PRIVILEGE AGAINST CRIMINATION.

(a) As to what is privileged.

Illinois: *Minter v. People*, 39 Ill. App., 438; s. c. 29 Northeast. Rep., 45 (a witness cannot refuse to testify as to the names of those violating the law, and as to their offense, because of a fear that they might give evidence against him in turn). *Iowa*: *Mahanke v. Cleland*, 76 Iowa, 401; s. c. 41 Northwest. Rep., 53 (a witness, by answering, must not only be

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exposed to public disapproval, but public hatred, detestation or dishonor, to entitle him to refuse to answer on the ground that he will be exposed to public ignominy). *Kansas*: In re Nickell, 47 Kan., 734; s. c. 28 Pacific Rep., 1076 (in a contempt proceeding against a party for inducing witnesses to absent themselves, he cannot be compelled to testify; the act of which he is accused of being made a crime by statute). *Stevens v. State*, 50 Kan., 712; s. c. 32 Pacific Rep., 350 (in bastardy proceeding, a witness cannot be compelled to testify as to whether he had had illicit relations with the relatrix, where his answer would expose him to a like prosecution, or would tend to convict him of a crime). *Michigan*: *People v. Mannausau*, 60 Mich. 15; s. c. 26 Northwest. Rep., 797 (where a witness declines to answer on the ground that his answer would tend to criminate him, he cannot be impeached by showing that he had admitted, under oath, the fact sought to be shown). *Missouri*: *State v. Summons Hardware Co.*, 1892, 18 Southwest. Rep., 1125 (the act of 1889, § 6, imposing the penalty of forfeiture of franchise upon corporations entering into pools, trusts, etc., and requiring corporate officers, under the penalty of fine and imprisonment, to inform the Secretary of State whether their corporation had violated the act, is in conflict with the constitutional provision, by which no one shall be compelled to testify as to matters which tend to criminate him). *New York*: *Davies v. Lincoln National Bank*, 19 State Rep., 905; s. c. 4 N. Y. Supp., 373; 16 Civ. Pro. R., 68 (under Code Civ. Pro., § 837, providing that a witness shall not be required to answer if his answer would expose him to a penalty or forfeiture, the president of a bank cannot be examined before trial in an action as to matters which would subject the bank to the penalty for taking usurious interest). *United States*: *Brunger v. Smith*, Cir. Ct., 49 Fed. Rep., 124 (where a witness, improperly claiming the privilege of an attorney, refuses to answer in a trial for an interference with a patent, the remedy is by a petition for an attachment, and not by an order to compel him to answer).

(b.) *How claimed and by whom.*

California: *Sharon v. Sharon*, 79 Cal., 633; s. c. 22 Pacific Rep., 26 (whereupon cross-examination to impeach him a witness is questioned as to a particular wrongful act, whether the question is pertinent or not, the witness may object to answering on the ground that it will tend to criminate him; but if the question is irrelevant, as well as incriminating, the party introducing the witness may also object, and his objection should be sustained, whether the witness object or not). *Colorado*: *Lathrop v. Roberts*, 16 Colo., 250; s. c. 27 Pacific Rep., 698 (the objection that the answer, if made, may tend to criminate the witness can only be made by the witness himself; it is not an objection by which a party may exclude testimony). *Illinois*: *Moline Wagon Co. v. Preston*, 35 Ill. App., 358 (it is error for the trial court to sustain a witness' objection to answering where the answer would merely tend to disgrace the witness), *Minter v. People*, 39 Ill. App., 438; s. c. 29 Northeast. Rep., 45 (to entitle a witness to the privilege of not answering, the court must be able to see from the circum-

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stances and the nature of the question there is reason to apprehend danger). *Iowa*: *State v. Van Winkle*, 80 Iowa, 15; s. c. 45 Northwest. Rep., 388 (defendant in a criminal action has no ground for exception, though a witness called in his behalf is wrongfully compelled to testify as to matters which would tend to criminate him). *Mahanke v. Cleland*, 76 Iowa, 401; s. c. 41 Northwest. Rep., 53 (a witness may be compelled to answer against his objection that it will tend to criminate him or expose him to public ignominy, unless it appears to the court that there is a reasonable ground for his objection). *Massachusetts*: *Commonwealth v. Gould*, 1893, 33 Northeast. Rep., 656 (in a prosecution for illegally selling liquor, defendant cannot object to a purchaser testifying as to matters which would tend to incriminate himself). *Minnesota*: *State v. Thaden*, 43 Minn., 253; s. c. 45 Northwest. Rep., 447 (to entitle a witness to the privilege of silence the court must be able to see from the circumstances that there is a reasonable ground to apprehend danger from being compelled to answer); s. p. *State v. Talk*, 43 Minn., 273; s. c. 45 Northwest. Rep., 449. *New York*: *Friess v. N. Y. Central, etc., R. Co.*, 67 Hun, 205; s. c. 22 N. Y. Supp., 104 (where it clearly appears from the nature of the question put a witness that an answer would tend to criminate him, the court may instruct the witness that he need not answer, and the examining party is not entitled to have the witness state the ground on which he refuses to answer). *Boston Marine Ins. Co. v. Slocovitch*, 55 N. Y. Super. Ct., 452 (it is no ground for exception, for the court instructed the witness as to his privilege). *North Carolina*: *People ex rel. Boyer v. Teague*, 106 N. C., 576; s. c. 11 Southeast. Rep., 665 (neither party can contend for a witness' privilege from not testifying as to how he voted, and he, the witness, is wrongfully compelled to testify against his will, his testimony, if competent in other respects, may be submitted to the jury). *Pennsylvania*: *Eckstein's Petition*, 148 Pa. St., 509; s. c. 24 Atlantic Rep., 63 (a witness cannot refuse to appear and be sworn on the ground that he has been indicted for the transaction which is the subject of investigation, he must wait until the question is put him before he can claim the privilege). *Commonwealth v. Bell*, 145 Pa. St., 374; 23 Atlantic Rep., 641 (a witness who declines to answer on the ground that it will tend to criminate him is not the sole judge whether it will have such effect; but it is for the trial judge to determine whether there is a reasonable ground for such refusal.) *Texas*: *Brown v. State*, Crim. app., 1893, 20 Southwest. Rep., 924 (no one but the witness himself can object to his testifying as to matters which tend to criminate him).

(c.) *Removal of danger or waiver by witness.*

Colorado: *Lathrop v. Roberts*, 16 Colo., 250; s. c. 27 Pacific Rep., 698 (after acquittal upon a criminal charge a witness cannot refuse to answer in relation thereto). *Iowa*: *State v. Van Winkle*, 80 Iowa, 15; s. c. 45 Northwest. Rep., 388 (where one jointly indicted with defendant testified before the grand jury to what he knew about the alleged crime, *held*, that upon the trial of the co-defendant, the witness could not refuse to testify

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on the ground that he might thereby tend to criminate himself). *State v. Peffers*, 80 Iowa, 580; s. c. 46 Northwest. Rep., 662 (defendant's wife was arrested for the murder of which defendant was also accused, and voluntarily testified before the coroner; held that as a witness for her husband she might be cross-examined as to what she testified to before the coroner, to lay a foundation for her impeachment). *Michigan*: *People v. Gosch*, 82 Mich., 22; s. c. 46 Northwest. Rep., 101 (where the wife of accused testifies in his behalf, the People are entitled to full and fair cross-examination upon all matters relevant to the case. *Missouri*: *Ex parte Baskett*, 106 Mo. 602; s. c. 17 Southwest. Rep., 753 (a witness is not excused from being compelled to testify as to whom he was gambling with, since Mo. R. S., § 3819, providing that the testimony of one who has been himself gambling shall in no case be used against him, affords the witness a protection co-extensive with that intended by the constitution). *New Hampshire*: *Manchester, Etc., R. Co. v. Concord R. R.*, 1891, 20 Atlantic Rep., 383 (where the prosecution for a penalty is barred by the statute of limitations, a party cannot refuse to discover matters connected with the transaction. *New York*: *People v. Tice*, 131 N. Y., 651; s. c. 30 Northeast. Rep., 494 (where defendant in a criminal action voluntarily testifies in his own behalf, he may be required on cross-examination to answer questions concerning his credibility and matters relevant to the issue, though he may not have been examined in reference thereto on his direct examination). *Gilpin v. Daly*, 59 Hun, 413; s. c. 13 N. Y. Supp., 390 (where in an action to recover money lost at gambling, the complaint charged a violation of Penal Code, §§ 341, 343, making gambling a misdemeanor, held, that the action was within Penal Code, § 341, providing that no person shall be excused from testifying as to the violation of the act against gambling upon the ground that it would tend to convict the witness, but that his testimony cannot be received against him in a criminal proceeding; and defendant might therefore be compelled to answer though his answer might tend to show that he had violated such law). *North Carolina*: *State v. Allen*, 107 N. C., 805; s. c. 11 Southeast. Rep., 1016 (defendant, in a criminal action, waives his privilege if he voluntarily testifies in his own behalf). *United States*: *Counselman v. Hitchcock*, 142 U. S., 547; s. c. 12 Supm. Ct., 195 (under the U. S. Constitution, 5th Amend., which declares that no person shall be compelled in any criminal case to be a witness against himself, a person under investigation before a grand jury as to the violation of the interstate commerce act, is not obliged to answer a question which he claims will tend to criminate him, though under U. S. R. S., § 860, no evidence given by such a witness could be in any manner used against him in any criminal proceeding; no statute which leaves a party or witness subject to prosecution after he answers questions, can have the effect of supplanting his constitutional privilege.

Ferris v. Hard, 135 N. Y., 354.

FERRIS v. HARD.

New York Court of Appeals, 1892.

[Reported in 135 N. Y., 354.]

Where there is a clear contradiction between the testimony of a witness and new matter stated as a defence in his sworn answer, he should be permitted to testify in explanation thereof that he stated the facts to the attorney who prepared the answer and was advised by the latter that there was no legal difference.

Where the party has been permitted without objection to give testimony contradicting the allegations of his pleading it is too late to object to the explanation as precluded by the pleading.

The distinction explained between an admission, in the answer, of an allegation in the complaint (which constitutes an issue and therefore limits the evidence), and an allegation of new matter in the answer.

Plaintiff sued to foreclose a mortgage made by the defendants, Samuel B. Hard and wife, to Joseph Bork, and by him assigned to the plaintiff. The verified answer of Samuel B. Hard to the amended complaint set up new matter relied on as a defence which contained the allegation: "that on or about the said tenth day of September, 1874, in order to secure said firm [Lyon, Bork & Co.], for loans of money theretofore made, or which might thereafter be made by them to the said defendant, said defendant made and executed the bond mentioned in the amended complaint herein and also procured to be delivered to Joseph Bork, one of the members of said firm, the mortgage mentioned and set forth in the said amended complaint herein for the benefit of said firm as collateral security for said loans made or to be made the said defendant."

Upon the trial Samuel B. Hard was called as a witness for the defence and testified as follows: "I told him [Bork], I wanted some money, that I would get my wife to execute a mortgage for \$10,000 on a part of the creek property, and think I said I would give my bond and asked him to sell it; I can't say whether anything more was said then, but at that time or some other time pending sale, I wanted him to accept my draft for about \$1,500;

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if I did not say it then I did some days after on finding that the mortgage could not be immediately sold ; nothing was said between me and Bork, that the mortgage should stand for anything I owed, or as I remember, about this bond and mortgage being given to secure any advances, subsequently to be made by either of said firms or by Bork."

The defendant, Margaret H. Hard, then offered to show by this witness that when his and Mrs. Hard's answers to the complaint herein were drawn, he informed the attorney who drew them that the bond and mortgage in question were executed and delivered to Bork, to be sold by him for the benefit of this witness, as absolute securities, and not as securities for any amount then owing by him or for advances thereafter to be made. That the said attorney advised him that there was no legal difference, that the mortgagee would have the right to hold them as such security, and that such was the legal effect of the transaction, and that, relying upon such advice and supposing it to be correct, he and the defendant Margaret H. Hard, answered said complaint as shown by their answers herein." The Court, on plaintiff's objection, excluded this testimony.

Upon the trial before *Referee* plaintiff recovered.

The Superior Court of Buffalo at General Term affirmed the judgment without opinion.

The Court of Appeals reversed the judgment.

PECKHAM, J. [*after stating facts*]: We think this offer should have been allowed to be proved. As the evidence stood a clear contradiction was shown between the evidence and the sworn answer of the witness, and any evidence which tended, if believed, to explain such contradiction in a manner consistent with the honesty of the witness the defendants were entitled to give.

If the plaintiff claims that the allegation in the answer was an admission of a fact which concluded the defendant so long as it remained a part of the pleading, one objection to such claim is that it comes too late. The plaintiff had permitted the evidence to be given which showed the contradiction, and it was

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then too late to interpose with an objection which would preclude any explanation of the contradiction. This is upon common principles of fairness. If the plaintiff had a conclusive objection to the proof of any fact which would contradict an admission in the answer, he was bound to state it when the evidence in contradiction was offered, and he should not be permitted to acquiesce in its admission without objection, and subsequently present the objection when the witness desires to explain this contradiction. Otherwise the plaintiff obtains the benefit of the contradiction and its effect as more or less of an impeachment of the rest of the evidence of the witness, while at the same time he secures the conclusive character of the admission in the pleading. This he should not be permitted to do.

Upon examination of the so-called admission we are of the opinion that it is not of such a character as to prevent on that ground evidence of an inconsistent fact. It admits no allegation of the complaint. That pleading made no allegation as to the consideration of the bond and mortgage. It alleged the execution of the bond in the penal sum of twenty thousand dollars, with the condition for the payment of ten thousand as therein stated, and that the mortgage was executed as security for the bond.

The answer of Mrs. Hard set up as an affirmative defense the execution of the mortgage for the purpose of securing the firm of Lyon, Bork & Co. for loans already made by that firm to her husband, or which might thereafter be made to him, and then stated the further facts necessary to secure an accounting, and denied the indebtedness of ten thousand dollars. The only admission that could possibly be here claimed would consist in an admission of the execution of a mortgage upon the lands described in the amended complaint.

It in fact is nothing but an allegation of the execution of a mortgage, coupled with and forming part of the allegation as to its consideration. An answer may contain a direct or an implied admission of some fact alleged in a complaint. The admission is implied when the fact alleged in the complaint is not denied in the answer. It is direct when the admission is made in terms.

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Either form of admission of an allegation contained in the complaint is conclusive upon a defendant so long as it remains in the pleading, and the plaintiff can point to it as conclusive proof of the truth of his allegation. (*Paige v. Willett*, 38 N. Y. 28; *Robbins v. Codman*, 4 E. D. Smith, 315, 325.)

An allegation contained in an answer setting up an affirmative defense, which has no reference to, and does not admit any allegation of the complaint, is of an entirely different nature. Such allegation is not an admission contained in a pleading which is conclusive so long as it remains in the record. An admission which so concludes a party admits something already alleged or set forth in the pleading to which the pleading containing the admission is an answer. In this case the allegation as to the consideration of the mortgage admitted nothing as to that consideration which was set forth in the complaint, for there was no allegation therein as to the consideration, and consequently the defendant was not concluded from showing a fact which was inconsistent with his allegation of the consideration on the ground that he had admitted the consideration and could not be heard to prove one inconsistent with such admission. The plaintiff could avail himself of the allegation in the answer as a declaration by defendant, and the defendant could explain it by other evidence so far as possible.

The question whether this evidence of the consideration as testified to by Mr. Hard was not objectionable on the ground that it changed substantially the defense (Code, § 723) is not now here. No such question was raised when the evidence was given. Subsequent to that time the defendants requested the referee to give them leave to amend the answers by striking out the allegations as to the consideration of the mortgage and by inserting allegations in conformity to the testimony of defendant, Hard. This was objected to by the plaintiff upon the ground that such amendment would change the issues and also because the defendants had been guilty of *laches*. The court denied the motion for lack of jurisdiction, and not as discretionary. I suppose the motion was made so that the evidence already in without objection might be regarded by the referee as properly taken upon a question raised by the pleadings and in order that he should not

ignore the evidence as not material to any issue raised, although coming in without objection. The defendants, of course, desired the benefit of this evidence, if there were any, and, therefore, naturally sought to have it appear as material evidence offered upon an issue raised by their answers in the action.

As there must be a new trial because of the error in refusing, under the circumstances already set forth, to allow the defendant, Hard, to explain the apparent contradiction in his evidence when compared with his answer, it is not necessary to decide whether the referee was or was not correct in his decision. The motion for leave to amend can be now made at Special Term, if defendants be so advised, before another trial is entered upon, and the court can decide the motion upon such terms as to it may appear to be just. The rules for permitting amendments to pleadings before trial so as to have them present the case as the parties desire it, are very properly quite liberal and there is no fear that the defendants will be treated with any injustice in such a matter.

It would be quite unfortunate for the parties if we should send this case back for a new trial without deciding the real question which appellants' counsel has so ingeniously argued. He says this mortgage was executed by the defendant, Mrs. Hard, as a surety for her husband's liability, and her contract must be judged according to the strictest rules governing contracts of sureties. The mortgage, he says, is in terms one to Joseph Bork and on its face purports to secure the payment to him of ten thousand dollars, and it cannot be enforced as security for the payment of Mr. Hard's debt to Lyon, Bork & Co., or any other firm, even though Joseph Bork were a member thereof, and it can only be enforced as a security for a debt owing to Joseph Bork personally. He urges that the contract is one to answer for the debt of a third person and must be in writing, and the writing must govern, even though it do not express the parol contract which in fact had been entered into. Thus, if Mrs. Hard had agreed by parol to secure by her mortgage the debts of her husband to Bork, or to any firm of which he was a member, and the mortgage was in terms to secure her husband's personal indebtedness to Bork alone, it could not, he argues, be enforced for the firm

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indebtedness because of the want of an agreement in writing to that effect. The principle claimed by the counsel may be correct, but it is not applicable to this case.

It is true that the indebtedness for which the land of Mrs. Hard is to be held liable is that of a third person, viz.: her husband, but her contract in regard to it is in writing and signed by her. The statute which forbids holding her liable for the debt of another, unless by virtue of her own contract in writing and signed by her, is thus complied with. Evidence of the real and actual consideration of the mortgage may always be given by parol. Either party is always at liberty to show for any purpose, except to prevent its operation as a valid deed or mortgage, that the consideration was different from that named in the instrument. (*Murray v. Smith*, 1 Duer, 412, and cases cited.) This principle is not affected because one of the parties to the instrument is a surety for some third person. Thus, in this case, it seems to me plain that parol evidence is admissible to show that the consideration for the execution of this written security for the payment of ten thousand dollars was the indebtedness then existing or subsequently to be incurred of Mr. Hard, the husband of the mortgagor, to Mr. Bork, or to any firm of which he was a member. The mortgagor must be privy to such consideration. The evidence of the real consideration does not change the liability of the party signing the mortgage. It shows the reasons for assuming the obligation and the character thereof. While the instrument might show a pecuniary consideration for its execution, parol evidence is admissible to show that the consideration was other than pecuniary. And this has been held not to violate the general rule that parol evidence is not admissible to contradict a writing. (Case above cited.) The same principle applies to the case of a surety. The consideration, while open to explanation, cannot be enlarged so as to enlarge the liability beyond that which the party has entered into in writing. The amount of the indebtedness of her husband for which Mrs. Hard's property described in the mortgage could be held liable, cannot in any event exceed ten thousand dollars and interest properly cast. She has only offered her land as security to that extent and she cannot be held beyond it by virtue of any

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parol agreement. She agreed to hold her land liable to secure the payment of ten thousand dollars in sums and at the times mentioned in the mortgage, and her land is not liable to secure the payment of any greater sum or at any other times than as she promised. Any indebtedness therefore which her land could secure must have been incurred and have become due not later than the times indicated for the payment of the moneys set out in the mortgage. Within the principle permitting parol evidence as to the consideration for which a written instrument was executed, it is entirely competent to show that the consideration upon which the defendant, Mrs. Hard, executed the mortgage to secure the payment of ten thousand dollars was the indebtedness of her husband then existing or thereafter to be incurred in favor of Mr. Bork or in favor of any firm of which he was a member. The agreement by which Mrs. Hard answers for the debt of a third person is the written mortgage signed by her. The consideration for the written agreement may be proved by oral evidence. This consideration will be a matter for proof upon the new trial which must be had, and we will not anticipate further the questions which may possibly be raised on such new trial.

All the judges concurred.

Judgment reversed.

CHESEBROUGH v. CONOVER.

New York Supreme Court, 1891.

[Reported in 13 N. Y. Supp. 374.]

A witness has a right to explain his testimony. If counsel prevents the exercise of this right, the failure to allow the explanation to go to the jury, may be ground for granting the other party a new trial.

The material facts appear in the opinion.

At Special Term, plaintiff recovered.

The Supreme Court at General Term, reversed the judgment: BRADY, J., saying: It appears from the record that this action

was brought to recover for services rendered to the defendant at his request. His answer was a denial. The issue thus made was brought to trial in June, 1890, when the plaintiff testified to the rendition of the services at the plaintiff's request, and the defendant contradicted the statement thereto directly. The scale was thus apparently evenly balanced, and the only evidence given to turn it was that of Edward P. Phelps, who was sworn on behalf of the plaintiff. He was a material witness, it is said in the affidavit of the defendant, and his manner on the stand evidently impressed the jury. The whole of what he testified to we are not shown by the record, but it appears that upon cross-examination he was asked whether he had sent a telegram, which was exhibited to him, and answered: "I may have sent it." He was then asked: "Have you any doubt about it?" He said "I don't know whether I have any doubt about it or not." And again, "What is your best recollection?" And the answer was, "Yes, coming through Mr. Conover's hands, I have a doubt about it." "Have you any reasonable doubt that you sent it?" "Yes," was the answer, "coming through his hands, I have. He would forge a man's name as soon as he would do anything else. May be he may have been at Albany and sent it." He was then asked a series of questions, but the object was to show that the answer in reference to Mr. Conover's readiness to forge a name was not responsive to any question asked him, and was a statement volunteered by him, both of which propositions he admitted. The trial lasted three days, and on the third day a verdict was rendered against the defendant and a judgment entered for \$18,102.17. It also appears that within a few days thereafter, to-wit, on the 23d of June, 1890, Phelps, without the solicitation and to the surprise of the defendant, sent a letter to the latter (a copy of which is set out in the record), and in which he admits that in the evidence he gave in reference to the defendant, he wrongfully charged him with a willingness to commit a heinous offense, and which charge he said: "I now wholly retract, as I had not reason then to believe, and do not now believe, you [meaning defendant] would do anything of the kind." He also stated that while under the influence of great excitement, caused by the savage attack of the defendant's

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lawyer upon him and his character, he said then what he had deeply regretted since it was uttered ; and still further that he did not fully realize the nature and scope of his statement until he read it as reported in the following morning papers, and went at once to the court, and before the trial was concluded, to have the complaint withdrawn and the offense corrected accordingly, but that Mr. Saunders, the plaintiff's lawyer, would not let him do it, and therefore decided on writing directly to the defendant to make some reparation for the wrong he had made. The response made to this state of facts by the plaintiff is in an affidavit made by him, the purport of which is that Mr. Phelps, on the day succeeding that on which he gave the offense, was told that he was liable to be arrested and be sent to prison for what he said about the defendant, and that three or four days afterwards a Mr. Cozans had said to Phelps that the defendant had been to see him, and said that he was going to have Phelps arrested, but that he had received letters from various people, asking him not to have it done, and that under fear and threat of arrest Phelps and his son had drafted a letter to the defendant, which was submitted by Phelps to Cozans and left with him for revision, which was made, and that Phelps informed the plaintiff of all these facts. There is no denial, however, by Mr. Saunders of the statement of Mr. Phelps that he had refused to permit the latter, while the trial was in progress, to make the correction which he contemplated, and which he went to the court for the express purpose of making, and the fact that he did go to court for the purpose mentioned, is wholly inconsistent with the statement made in the plaintiff's affidavit that three or four days afterwards Mr. Cozans communicated to the defendant his intention to have Phelps arrested, and that under that fear and threat Phelps had drafted the letter, to which reference had been made. This is so, for the reason, as we have seen, that Phelps appeared at the opening of the court on the day succeeding the day on which he gave his testimony, determined to withdraw the charge then in reference to the defendant's readiness to commit forgery, and in the proper way. There can be no doubt that in a closely contested case, as this appears to have been, Phelps' statement as originally made would have an

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effect upon the jury, an effect, indeed, undoubtedly prejudicial to his credibility; and there is no doubt either that when the application was made to Mr. Saunders for the opportunity to make the correction, Mr. Phelps felt bound conscientiously to do, he should have been permitted to do so, and the jury thus advised of the circumstances and the feeling which induced him to make the accusation.

It is not necessary to resort to precedents to show that the right of explanation is one of grave importance, duly respected by the courts and always allowed. It is well recognized in the ordinary proceedings of a trial. It is done *ex debito justitiae*, and in many cases in which I have presided, and in which witnesses have sought to explain their testimony, it has never been refused. It is true that in the case of *People v. McGuire*, 2 Hun, 269, an affidavit made by a person who was a witness on the trial, and in which he admitted having committed perjury, was disregarded, but for the reasons that when his affidavit was made it was quite evident no latitude of indulgence would justify the belief that he was then truthful; that he might have been so on the trial, but when his affidavit was made he certainly was not so. And more particularly for the reason that his evidence in the case was substantially the same as that given by another witness, who, at the time of the occurrences testified to, was similarly employed, and of whose truthfulness no reason appeared for doubt. But that case was entirely different from this. There was no application there to correct the evidence given made during the trial. Aside from that, the testimony of the witness in that case went to the main issue. Here the charge against the plaintiff was collateral, was not responsive to any question asked, and was expressed under great excitement, caused by what the witness considered to be a savage attack upon him and his character; and what he said was an opinion seriously affecting the defendant's integrity, springing from the feeling of resentment or indignation, and therefore impulsive and wrong. It may be that if the application which was made to vacate the judgment and for a new trial did not present the impressive fact that the witness sought the counsel of the plaintiff on the day following the utterance of the testimony to correct his error, the applica-

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tion might, in the exercise of a sound discretion, have been denied, but with that fact uncontradicted the administration of justice seems to demand a new trial. It is clearly the duty of counsel to develop the truth in all controversies so far as may be, and undoubtedly to give the witnesses called on behalf of their clients an opportunity during a trial to correct any statement made while under examination as a witness.

All the judges concurred.

Judgment reversed.

MEAKIM v. ANDERSON.

New York Supreme Court, 1851.

[Reported in 11 Barb., 215.]

It is in the discretion of the trial judge whether or not to allow a witness to be recalled for the purpose of explaining his testimony, after his examination has been fully concluded, and he has left the stand and had a conference with the attorney who asks to have him recalled to explain.

Motion to set aside verdict and for new trial.

KING, J. [*on this point said*] : The third exception was to the judge's refusal to recall, upon application by the plaintiff, a witness originally introduced by the defence, to explain part of his testimony on the ground that it had been misunderstood. The witness had been examined and cross-examined, and permitted to leave the stand ; and had subsequently conversed with the plaintiff's counsel. The judge stated that the witness had, both in his original and cross-examination, made the statement which he desired to explain, and that he did not think proper to permit such explanation, when there was no doubt as to what the witness stated, and after a conference with the plaintiff's counsel. It was in the discretion of the judge to permit, or refuse the re-examination ; the discretion seems to have been properly exercised, and the exception should be overruled on that score, even if we could now review the exercise of his discretion. (*People v. Rector*, 19 Wend., 578 ; *Law v. Merrills*, 6 *id.*, 281.)

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BECKER v. KOCH.

New York Court of Appeals, 1887.

[Reported in 104 N. Y., 394.]

The rule against a party impeaching his own witness only prohibits it in three cases ; (1) The calling of witnesses to impeach the general character of the witness ; (2) the proof of prior contradictory statements by him ; and (3) a contradiction of the witness by another where the only effect is to impeach, and not to give any material evidence upon any issue in the case.

The rules applicable to the examination of other witnesses do not in their strictness apply to an adverse witness ; who may be cross-examined and have leading questions put to him by the party calling him for the reason that he is adverse, and the danger arising from such a mode of examination by the party calling a friendly or unbiased witness does not exist.

Replevin to recover possession of goods ; which defendant justified taking as sheriff under process against one Exstein, who had assigned the property in question, with other assets, to the plaintiff, for benefit of creditors.

At Trial Term, the judge directed a verdict for plaintiff, and ordered exceptions to be heard at *General Term*.

The Court at General Term directed judgment for the plaintiff.

The Court of Appeals reversed the judgment.

PECKHAM, J. [*after passing on another question*] : The court directed a verdict for the plaintiffs, and if, therefore, there was evidence enough to authorize a submission of the question of fraud to the jury the judgment must be reversed. We think there was, and had it not been for the rule of law adopted by the court below, we suppose that court would have been of the same opinion. That rule was that as the defendant called a witness by whom he attempted to prove the fraud, and as that witness denied it, the defendant was bound by that denial, in the

absence of contradiction by some other witness, even though the jury might think some parts of the evidence of the witness clearly showed its existence.

To show exactly how the question arose and what was decided, by the court, some reference must be made to the testimony, although it will be unnecessary to allude to it all.

The assignor, Exstein, was a merchant engaged in a large business in Buffalo. He kept regular books of account in his business, which were produced upon the trial, and he was called as a witness for the defendant and gave evidence in relation to the books and upon other matters.

His assignment was made on the seventeenth of October, and on the sixteenth of that month he made entries in several accounts which he kept, crediting quite large sums of money to the different persons named in such accounts, the result of which entries was to cause it to appear by the books, that the assignor was in debt to a somewhat large amount, while, if the entries as of the sixteenth of October were stricken out, it would then appear that the parties instead of being creditors were in reality debtors of the assignor. When on the stand he substantially stated that if those entries were stricken out, the state of affairs between himself and those persons would be as represented in the books, or in other words, that excluding those entries and the circumstances upon which they rested, some of these persons would be his debtors. He also said that these entries did not, in fact, represent any actual transaction occurring at the time when they were made, that no valuable or other consideration passed between him and those parties at such time. Stopping with these facts, it would appear, then, that credits were given these persons the day before the assignment, upon which some of them drew out moneys from him, and upon the basis of which one was made a preferred creditor in the assignment, and yet such entries represented no actual, present transactions happening at the time when they were made.

Unexplained, it would appear that, as a result, Exstein had provided for the payment of large sums of money, or had already, and in view of his assignment, paid such sums to persons whom he did not owe, or, in other words, he had paid and also.

made provision in his assignment for the payment of fictitious debts.

The defendant, however, proceeded with his examination of this witness, and asked for an explanation of these entries and the facts or circumstances upon which they were based, and the witness proceeded to give it. The explanation was, if true, sufficient in law and showed that he did owe the persons the amounts he claimed to, with the possible exception of one or two cases in which the defendant claims that even on the basis of the general truth of the explanation, the witness had charged himself in reality with more than he owed. The defendant then rested, and the plaintiffs, with the evidence in this state, asked for a verdict in their favor by the direction of the court, and obtained it.

The court held, in substance, that the books of the witness Exstein showed a *prima facie* case of an indebtedness of the witness in the amounts therein appearing, and to the persons therein mentioned, and the witness said they were correct. He then stated what has already been alluded to as to those entries made on the sixteenth of October, and continued by explaining the facts upon which they were based. This explanation, the court said, was totally uncontradicted by any other witness, and defendant was therefore bound by what Exstein said on that subject, for the reason that he could not discredit or impeach him, and must take what he said as, under the circumstances of the case, true.

If that were the true rule, the court was correct in directing a verdict. The General Term, it must be presumed, also took the same view of the case in directing judgment for the plaintiffs without delivering any written opinion.

The general rule prohibiting the impeachment or discrediting of a witness by the party calling him was extended too far in this case. Here was an issue of fraud in the making of an assignment by the assignor, and the defendant, in order to prove its existence, called the very man as a witness whom he alleged was guilty of the fraud. He might well be regarded therefore as an adverse witness, whom the party by the exigencies of his case was obliged to call.

With regard to such witnesses it is well settled that all the rules applicable to the examination of other witnesses do not in their strictness apply. An adverse witness may be cross-examined, and leading questions may be put to him by the party calling him for the very sensible and sufficient reason that he is adverse, and that the danger arising from such a mode of examination by the party calling a friendly or unbiased witness does not exist.

What favorable facts the party calling him obtained from such a witness may be justly regarded as wrung from a reluctant and unwilling man, while those which are unfavorable may be treated by the jury with just that degree of belief which they may think is deserved, considering their nature and the other circumstances of the case.

Starkie, one of the ablest and most philosophical of English writers on this branch of the law, in speaking of a reluctant or adverse witness, uses almost the precise language above stated, and which has been substantially quoted from him. (Starkie on Ev. [9th ed.], m. p. 248.) Sometimes rather loose language has been indulged in to the general effect that a party cannot impeach his own witness, but when an examination is made as to the limits of the rule the result will be found to be that it only prohibits this impeachment in three cases, viz.: (1) the calling of witnesses to impeach the general character of the witness; (2) the proof of prior contradictory statements by him, and (3) a contradiction of the witness by another where the only effect is to impeach and not to give any material evidence upon any issue in the case. (*Lawrence v. Barker*, 5 Wend., 301-305; *People v. Safford*, 5 Den., 112; *Thompson v. Blanchard*, 4 N. Y., 303-311; *Coulter v. Express Co.*, 56 N. Y., 585; 2 Starkie on Ev. [9 Am. ed.], m. p. 244-250; 2 Phil. on Ev. [C. and H. and Ed. notes], m. p. 981, 982, 983 and note 602; 1 Green on Ev., § 442.) In regard to the first class the rule has been stated to rest upon the theory that when a party calls a witness he presents him to the jury as worthy of belief, and to allow him to call witnesses thereafter to impeach his general character as a man, would be to permit an experiment to be made upon the jury by producing a person as worthy of belief (whom he knows

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and has witnesses to prove to be the contrary), and if his evidence be favorable, to get the benefit of it, and if the reverse, to overwhelm it by the impeaching witnesses.

In such a case as this, however, there is no deception. The defendant calls the very man he accuses of the fraud as a witness to prove it and says, in effect, to the jury, that such evidence as the witness gives, which tends to show the perpetration of the fraud alleged, is forced from him by the exigencies of the case and the surrounding facts, which cannot be denied, while that which he gives that looks towards an explanation of the fraud the jury shall give such faith to as under all the facts in the case they may think it entitled to.

As to the second class in which an impeachment is forbidden, the authorities in England were in conflict, many of the judges thinking it allowable to prove prior contradictory statements by a witness, but the weight of authority was against it, thereby creating the occasion for an interference by the legislature with the law of evidence, which passed an act permitting just such evidence under certain restrictions. (See C. L. Pro. act of 1854, 17 and 18 Vic., chap. 125, § 22). The non-admissibility of such evidence in the courts of this state is, of course, not open to discussion. It is alluded to only to show the opinion of the English Parliament (in matters of this nature almost exclusively guided by lawyers) upon this question of impeaching one's own witness, and the readiness of that body to alter the law of evidence in the direction of what seemed to it greater opportunity of ascertaining and administering that for which all courts are instituted, viz., truth and justice.

The third of above classes, where no impeachment is allowed, is plainly set forth in several of the cases and text books above cited.

It is not admissible, even in the case of a witness called by the other side, to impeach him by proof of prior contradictory statements on immaterial or collateral issues, and there is not much difference in the two cases, and, therefore, no reason why it should be allowed with reference to one's own witness. But all the cases concur in the right of a party to contradict his own witness by calling witnesses to prove a fact (material to the issue)

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to be otherwise than as sworn to by him even when the necessary effect is to impeach him.

Why should not the right exist to show that a portion of the evidence of your own witness is untrue, by comparing it with another portion of the evidence of the same witness and with the other facts in the case.

The courts below say in effect, that although a portion of Exstein's evidence shows that he provided for payment in his assignment for fictitious debts, yet the other portion of his evidence (if believed) shows that such debts were not fictitious, and although the defendant was at liberty to call other witnesses to prove that the explanation was false, yet as he did not do so, the explanation must stand as matter of law, and he cannot be heard to contend that it is proved false by its own absolute and inherent improbability. We do not believe, at least in such a case as this, that the rule goes to any such length.

The plaintiffs cite the case of *Branch v. Levy* (46 Sup'r Ct. Rep., 428) as upholding the rule laid down by the trial court. The plaintiffs there brought an action to recover damages from defendants for the non-delivery of coupons bought from defendants' agent, as plaintiffs claimed, but defendants denied the agency and alleged they had sold the coupons to the person whom plaintiffs alleged was their agent, and had no liability for his subsequent acts. On the trial plaintiffs sustained their claim *prima facie* by certain letters and circumstances, which, as the court said, in the absence of explanation by defendants, made a question for the jury. The plaintiffs then, for some inexplicable reason, called one of the defendants, who swore that the person selling the bonds to the plaintiffs was not the agent of the defendants but that they had simply sold him the bonds. The court held the plaintiffs concluded by this evidence and that they must take it as wholly credible; that credibility could not be divided, and that it was attached to the moral character.

That case comes very near the one under discussion, and it is hard to see why the plaintiffs should not have been allowed to go to the jury upon the whole of their case, letters, documents and explanation, and why they should not have been allowed to ask the jury to believe the documents and letters and reject the

explanation as in their judgment untrue. To say that credibility is a part of the moral character and indivisible, is to run counter to the well established rule as to adverse witnesses above referred to, whose testimony you may ask a jury to believe in part and to disbelieve the residue. The case ought not to be followed.

It is a good general rule that the credibility of a witness is matter for the jury, and the fewer technical obstructions there are to the practical operation of that rule the better. We think that the whole evidence of Exstein in this case should have been submitted to the jury for them to pass upon its credibility, and that they were at liberty to believe that portion which tended to show the debts to be fictitious and to disbelieve the explanation, or that they might regard it as sufficient, just as in their judgment, intelligently and honestly exercised, they might determine.

Of course we do not mean by this decision to give any intimation as to which view should be taken by the jury; we only decide that it was a question for them and not the court.

The judgment should be reversed and a new trial granted, costs to abide the event.

All the judges concurred.

Judgment reversed.

NOTES OF RECENT CASES ON IMPUGNING ONE'S OWN WITNESS.

I. *Statements contradictory to his present testimony.*

Alabama: Griffith v. State, 90 Ala., 583; s. c. 8 Southern Rep., 812 (it was held not error to allow the prosecuting attorney upon a trial for murder to ask a witness for the State, whether she had not stated the facts differently in a previous interview with him). *California:* People v. Mitchell, 94 Cal., 550; s. c. 29 Pacific Rep., 1106 (if a witness merely fails to testify as expected, it does not authorize the party calling him to prove that the witness elsewhere had made the desired statement). *Georgia:* Dixon v. State, 86 Ga., 754; s. c. 13 Southeast. Rep., 754 (it is error to permit the state in a criminal prosecution to ask a witness called by it as to whether he had not made certain specified statements, and then to call other witness to contradict him, where there is nothing to show that the State was misled or entrapped by such witness). *Illinois:* National Syrup Co. v. Carlson, 42 Ill. App., 178 (if a party has been surprised by the testimony of his own witness, and the witness on being questioned denies hav-

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ing made previous contradictory statements, it is competent to prove that he did make such statements by other witnesses). *Indiana*: *Miller v. Cook*, 127 Ind., 339; s. c. 26 Northeast. Rep., 1072 (the right of a party producing a witness to show that he made statements different from his present testimony upon the ground of surprise under Ind. R. S., 1881, § 507, is a matter of discretion for the trial court). *Iowa*: *Hall v. Chicago, etc.*, R. Co., 84 Ia., 311; s. c. 51 Northwest. Rep., 150 (though it is permissible to allow a party who has been surprised by the testimony of his own witness, to examine such witness concerning previous contradictory oral or written statements, it is error to allow other witnesses to testify as to his statement, or to allow his written statements to be put in evidence). *Massachusetts*: *Batchelder v. Batchelder*, 139 Mass., 1; s. c. 29 Northeast. Rep., 61 (a party cannot, under Mass. Pub. Stat., c. 169, § 22, contradict his own witness by showing that he has at other times made statements inconsistent with his testimony if the circumstance of the supposed statement sufficient to designate the particular occasion are not first mentioned to the witness, or if the testimony is not material to the issue). *Mississippi*: *Chism v. State*, 70 Miss., 742; s. c. 12 Southern Rep., 852 (where a witness called by state on a murder trial denies knowledge of the homicide, it is error to allow the state to show that the witness testified favorably to it before the grand jury, since such witness did not testify adversely to the state by merely denying knowledge). *Oregon*: *Langford v. Jones*, 18 Oreg., 307; s. c. 22 Pacific Rep., 1064 (a party whose witness gives unsatisfactory evidence cannot prove the witness' statements at another time which were favorable to the party's case). *Pennsylvania*: *McNerney v. City of Reading*, 150 Pa. St., 711; s. c. 25 Atlantic Rep., 57 (where a witness proves unwilling and gives evidence which is a surprise to the party by whom he is called, it is within the discretion of the court to permit the party calling the witness to cross-examine him as to statements and conduct contradictory to his testimony). *Fisher v. Hart*, 149 Pa. St., 232; s. c. 24 Atlantic Rep., 225 (where a witness to an inquiry as to an event answered that he did not remember, and to the succeeding question, "Did you not tell me so yesterday?" also answered, "I do not remember." No further effort was made to refresh the witness' memory. *Held*, that the party calling the witness was erroneously allowed to treat him as adverse). *Oregon*: *Langford v. Jones*, 18 Oreg., 307; s. c. 22 Pacific Rep., 1064 (a party whose witness gives unsatisfactory evidence cannot prove the witness' statements at another time, which were favorable to the party's case). *Rhode Island*: *Hildreth v. Aldrich*, 15 R. I., 163; s. c. 1 Atlantic Rep., 163 (though a party disappointed by the testimony of his own witness may refresh the witness' recollection by asking him if he has not made contradictory statements, it is error to allow the party to prove such statements by other witnesses). *Texas*: *Self v. State*, 28 Tex. App., 398; s. c. 13 Southwest. Rep., 602 (it is not error upon a criminal prosecution to permit the state to prove that one of its witnesses had previously made statements contradictory to his testimony; it is permissible under Tex. Code Crim. Pro., Art. 735, for the state to attack

its witnesses in any manner except by proving their bad character). *Scott v. State*, Tex. Crim. App. 93, 20 *id.*, 549 (a party who knows beforehand that a witness called by him is hostile and what he will probably swear to will not be allowed to impeach the witness by showing contradictory statements, since the party has not been unexpectedly injured by his testimony). *Vermont: Hurlburt v. Hurlburt*, 63 Vt., 667; s. c. 22 Atlantic Rep., 850 (where trial court ruled that the testimony of a witness was adverse within the meaning of the statute relating to the impeaching of adverse witnesses, held that it was a sufficient finding that the witness himself was adverse, and not his testimony merely). *Good v. Knox*, 64 Vt., 97; s. c. 23 Atlantic Rep., 520 (though under Vt. R. L., 1089, a party to a civil action may compel the adverse party to testify in his behalf, and the party so called may be examined under the rules applicable to cross-examination, yet if a party call his adversary for the purpose of fixing the liability not on the witness himself but on a co-defendant, it is not error to exclude inquiries as to witness' previous contradictory statements).

II. *Foundation for evidence of contradictory statements.*

In jurisdictions where evidence of previous conflicting statements is admissible to impeach a party's own witness who has proved hostile, it is required that a foundation therefor shall be first laid by sufficiently calling the attention of the witness sought to be impeached to the statements proposed to be proved; see, *Diffenderfer v. Scott*, Ind. App., 1892, 32 Northeast. Rep., 87; *Bennet v. State*, Tex., 1890, 13 Southwest. Rep., 1005; *Watson v. St. Paul City Ry. Co.*, Minn., 1889, 43 Northwest. Rep., 904.

III. *Contradicting one's own witness by other evidence.*

The rule—that a party is not bound by the testimony of his own witness as to a material fact, but may contradict him by other evidence, though such evidence may incidentally discredit the witness—is supported by the following cases:

Colorado: Moffat v. Tenney, 17 Colo., 189; s. c. 30 Pacific Rep., 348. *Illinois: McFarland v. Ford*, 32 Ill. App., 173. *Indiana: Crocker v. Agnbrood*, 122 Ind., 585; s. c. 24 Northeast. Rep., 169. *Iowa: Thomas v. McDaniel*, 1893, 55 Northwest. Rep., 499; *Smith v. Utesch*, 1892, 52 *id.*, 343. *Michigan: Webber v. Jackson*, 79 Mich., 175; s. c. 44 Northwest. Rep., 591. *Minnesota: Schmidt v. Darnham*, 50 Minn., 96; 52 Northwest. Rep., 277. *Missouri: Edwards v. Crenshaw*, 30 Mo. App., 510. *North Carolina: Chester v. Wilhelm*, 111 N. C., 314; s. c. 16 Southeast. Rep., 229. *United States: Graves v. Davenport*, Dist. Ct., 1892, 50 Fed. Rep., 881.

IV. *Bias of one's own witness.*

In *Mellen's Estate*, 56 Hun, 553; s. c., 9 N. Y., Supp., 929, it was held error to allow a party producing and examining a witness to afterwards impeach him by evidence showing his bias or interest in favor of the adverse party.

GERTZ v. FITCHBURG R.R. CO.

Supreme Court of Massachusetts, 1884.

[Reported in 137 Mass., 77.]

After it has been sought to discredit a witness by evidence of his conviction of crime, the party who called him has a right to give evidence of his present good reputation for veracity.

Exceptions taken on the trial.

The Supreme Court set aside the judgment.

HOLMES, J. In this case, the plaintiff having testified as a witness, the defendant put in evidence the record of his conviction in 1876, in the United States District Court, of the crime of falsely personating a United States revenue officer. The plaintiff then offered evidence of his character and present reputation for veracity, which was excluded, subject to his exception.

We think that the evidence of his reputation for truth should have been admitted, and that the exception must be sustained. There is a clear distinction between this case and those in which such evidence has been held admissible, for instance, to rebut evidence of contradictory statements; *Russell v. Coffin*, 8 Pick., 143; *Brown v. Mooers*, 6 Gray, 451; or where the witness is directly contradicted as to the principal fact by other witnesses. *Atwood v. Dearborn*, 1 Allen, 483.

In such cases, it is true that the result sought to be reached is the same as in the present, to induce the jury to disbelieve the witness. But the mode of reaching the result is different. For while contradiction or proof of contradictory statements may very well have the incidental effect of impeaching the character for truth of the contradicted witness in the minds of the jury, the proof is not directed to that point. The purpose and only direct effect of the evidence are to show that the witness is not to be believed in this instance. But the reason why he is not to be believed is left untouched. That may be found in forgetfulness on the part of the witness, or in his having been deceived,

or in any other possible cause. The disbelief sought to be produced is perfectly consistent with an admission of his general good character for truth as well as for other virtues; and until the character of a witness is assailed, it cannot be fortified by evidence. On the other hand, when it is proved that a witness has been convicted of a crime, the only ground for disbelieving him which such proof affords is the general readiness to do evil which the conviction may be supposed to show. It is from the general disposition alone that the jury is asked to infer a readiness to lie in the particular case, and thence that he has lied in fact. The evidence has no tendency to prove that he was mistaken, but only that he has perjured himself, and it reaches that conclusion solely through the general proposition that he is of bad character and unworthy of credit. 1 Gilb. Ex. (6th ed.), 126.

The conviction in the United States District Court was for a felony punishable with imprisonment (U. S. St. of March 2, 1867, §28); and, assuming that it stands on the same footing as a conviction in another state, it would have been admissible, according to the dicta in our cases, independently of statute, not to exclude the witness, but to impeach his credit. *Commonwealth v. Green*, 17 Mass., 515, 541. *Commonwealth v. Knapp*, 6 Pick., 496, 511. *Utley v. Merrick*, 11 Met., 302. See Rev. Sts., c. 94, §56. And when a conviction is admitted for that purpose, it always may be rebutted by evidence of good character for truth. *Commonwealth v. Green*, *ubi supra*. *Russell v. Coffin*, 8 Pick., 143, 154. *Rex v. Clark*, 2 Stark., 241. *Webb v. State*, 2 Ohio St., 351.

It is true that a doubt is thrown upon this doctrine in *Harrington v. Lincoln*, 4 Gray, 563, 568; but that case was decided on the ground that the cross-examination which showed that the witness had been charged with a crime also showed that he had been acquitted, and cannot be regarded as authority against our decision, whether the *ratio decidendi* adopted be reconcilable with later cases or not. *Commonwealth v. Ingraham*, 7 Gray, 46.

The applicability of the foregoing reasoning is made clear by the language of our statutes. By the Pub. Sts., c. 169, §19, the only purpose for which conviction of a crime may be shown, in

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any case, is to affect credibility. Even if the conviction proved here would have excluded the witness but for the statute cutting down its effect, it could not be maintained that evidence of reputation for truth remained inadmissible because it would have been so when the witness was excluded. That statute puts all convictions of crime on the same footing—those which formerly excluded, those which always have gone only to credibility, and, it would seem, those which formerly would not have been admissible at all. (We assume that the words “a crime” in the Pub. Sts., c. 169, §19, means the same as “any crime” in the St. of 1870, c. 393, §3, Gen. Sts., c. 131, §13. Sts. 1852, c. 312, §60; 1851, c. 233, §97. *Commonwealth v. Hall*, 4 Allen, 305.) And, therefore, any evidence which was admissible to rebut a conviction that only discredited before the statute, must now be admissible to rebut all convictions that may be put in evidence. Whether any different rule would apply when the fact is only brought out on cross-examination we need not consider.

The exceptions to the exclusion of evidence that the witness was innocent of the offense of which he was convicted, and explaining why he was convicted, is not much pressed, and is overruled. *Commonwealth v. Gallagher*, 126 Mass., 54.*

Exceptions sustained.

NOTES OF RECENT CASES ON IMPEACHING ADVERSARY'S WITNESS.

(a) *By evidence of crime.*

Connecticut: *Card v. Foot*, 57 Conn., 427; s. c. 18 Atlantic Rep., 713 (under Conn. Gen. Stat., §1098, a witness cannot be impeached by showing that he was convicted of a petty offense, but only his conviction of some infamous crime which disqualified a witness at common law can be shown). *Georgia*: *Ford v. State*, 1893, 17 Southeast. Rep., 667 (a witness' conviction of a crime involving moral turpitude may be shown to impeach him). *Michigan*: *Cole v. Lake Shore*, etc., R. Co., 95 Mich., 77;

* On this point the New York cases are to the contrary. *Sisson v. Yost*, 12 N. Y. *Supp.*, 373, holds that it is error to exclude questions tending to show the promptitude of the granting of pardon and the reason therefor, after the record of the witness's conviction for perjury had been admitted.

In *Sims v. Sims*, 75 N. Y., 466, *held*, that a judgment of conviction in a criminal case is *not* conclusive in a civil case, and *error* to refuse to allow the witness to answer whether he was guilty or not.

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s. c. 54 Northwest. Rep., 638 (though evidence of the arrest and conviction of a witness for a crime is admissible as affecting his credibility, it is not competent to show what he testified on his trial in regard to the charge made against him). *Minnesota*: State v. Bauer, 42 Minn., 258; s. c. 44 Northwest Rep., 115 (under Mich. Pen. Code, § 53, providing that the conviction of "any crime" may be shown as affecting a witness' credibility, a witness' conviction for a misdemeanor as well as his conviction for a felony may be shown). *Mississippi*: Helm v. State, 67 Miss., 562; s. c. 7 Southern Rep., 487 (the record of a witness' conviction for a misdemeanor is admissible in evidence to impeach him). *Rhode Island*: State v. McGuire, 15 R. I., 23 (a defendant in a criminal case who testifies in his own behalf may be impeached like any other witness by showing his conviction for a felony).

In *Helwig v. Laschowski*, 82 Mich., 619; s. c. 46 Northwest. Rep., 1033, it is held that a witness' conviction for a crime which could formerly be shown to disqualify him can now be shown as affecting his credibility; and as formerly the objecting party was not bound to accept the statement of a witness as to his conviction for a crime but might prove it against his denial, so now a party who desires to show a like fact to discredit a witness should not be bound by his answer.

(b) *By showing bad character.*

Alabama: Rivers v. State, 1893, 12 Southern Rep., 434 (upon a criminal trial it is error to exclude defendant's evidence to show that a witness for the state was a professional witness in gaming cases and had been hired by third persons to work up and prosecute such cases). *McInerney v. Irvin*, 90 Ala., 275; s. c. 7 Southern Rep., 841 (a female witness cannot be impeached by showing her bad character for chastity); s. p. *Birmingham Union Ry. Co. v. Hale*, 90 Ala., 8; s. c. 8 Southern Rep., 142. *California*: People v. Sherman, 1892, 32 Pacific Rep., 879 (that improper relations existed between two witnesses, a man and a woman, called by the same party cannot be proved to impeach the woman's testimony). *Indiana*: Sage v. State, 127 Ind., 15; s. c. 26 Northeast. Rep., 667 (a witness cannot be impeached by showing his reputation in a community in which he had not resided by reason of imprisonment for seven years previous to the trial). *Iowa*: Winter v. Central Iowa Ry. Co., 80 Ia., 443; s. c. 45 Northwest. Rep., 737 (an instruction to the jury, that before a witness can be regarded as impeached on account of his bad reputation for truth and morality, it must be shown that his bad reputation is general in the community in which he lives, is proper). *Kansas*: Coates v. Sulau, 46 Kan., 341; s. c. 26 Pacific Rep., 720 (where the witness sought to be impeached changed his residence within a few months before the trial, it is not error to allow another witness who knew him a long time at his former residence to testify as to his reputation for truth). *Louisiana*: State v. Christian, 44 La. Ann., 950; s. c. 11 Southern Rep., 589 (a witness as to the character of a witness sought to be impeached may be asked whether, from his general knowledge of the latter's character for truth and veracity, he

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would believe him under oath). *State v. Johnson*, 41 La. Ann., 574; 7 Southern Rep., 670 (a question as to a witness' reputation for truth and veracity will be excluded if it does not call for his general reputation in the neighborhood in which he lived). *State v. Jackson*, 44 La. Ann., 675, s. c. 10 Southern Rep., 600 (a witness as to bad character of another witness was asked whether the latter did not live and associate with criminal people and whether his associates were not lewd and abandoned women. *Held*, that such inquiry was properly excluded; investigation as to a witness' character must extend to the witness' whole conduct and character so as to establish such moral depravity that no one would be justified in believing his sworn statement if uncorroborated). *Michigan*: *People v. Mills*, 94 Mich. 630; s. c. 54 Northwest. Rep., 488 (lack of chastity cannot be shown to impeach the credibility of a female witness). *Missouri*: *State v. Raven*, 1893, 22 Southwest. Rep., 76 (in discrediting a witness the inquiry is not limited to his general reputation for truth and veracity but may be extended to his general moral character). *State v. Rogers*, 108 Mo., 202; s. c. 18 Southwest. Rep., 976 (evidence of a specific and independent immoral act is inadmissible to impeach a witness). *State v. Shrayner*, 104 Mo., 441; s. c. 16 Southwest. Rep., 286 (a male witness's reputation as to chastity may be shown to impeach him; there is no distinction in this respect between a male and a female witness); *Contra*: *State v. Clawson*, 30 Mo. App., 139. *New York*: *National Bank v. Scrivner*, 63 Hun., 375; s. c. 18 N. Y. Supp., 277; 44 State Rep., 331 (a witness may testify from his personal knowledge of another witness whether he would believe him under oath, though he knows nothing of such person's reputation among others for truth and veracity). *North Carolina*: *State v. Hawn*, 107 N. C., 810; s. c. 12 Southeast. Rep., 455 (a witness cannot be impeached by evidence that by general report he was guilty of a particular offense). *Texas*: *Browder v. State*, 30 Tex. App., 614; 18 Southwest. Rep., 197 (the trial court should not unreasonably limit the number of witnesses by which a party seeks to impeach the character of a witness for the adverse party; the testimony of additional witnesses as to character should not be excluded merely because their testimony is cumulative). *Virginia*: *Briggs v. Commonwealth*, 82 Va., 554 (it is not competent to impeach a witness by evidence that "he was given to rows and to putting them off on others)."

(c.) *As to particular crimes, wrongful acts, etc.*

California: *People v. Rodrigo*, 69 Cal., 601; s. c. 11 Pacific Rep., 481 (a party seeking to impeach witness may ask him on cross-examination whether a judgment and sentence had not been pronounced against him for a felony, without producing the record of conviction). *Jones v. Duchow*, Cal., 1890, 23 Pacific Rep., 371, under Cal. Code Civ. Pro., § 2051 (providing that a witness cannot be impeached by evidence of particular wrongful acts, it is error to allow a witness to be asked on cross-examination whether he was not the person who was arrested for beating a woman of the town, and who appeared, pleaded guilty and paid a fine therefor). *People v. Fong Ching*, 78 Cal., 169; s. c. 20 Pacific Rep., 396 (where de-

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fendant as witness had testified in chief as to his birth, parentage, education, etc., it was held not error to allow him to be asked on cross-examination as to whether he had ever been arrested). *People v. Carolan*, 71 Cal., 195; s. c. 12 Pacific Rep., 52 (it is not error not to permit a witness to be cross-examined as to whether he had been convicted of a misdemeanor). *Barkly v. Copeland*, 86 Cal., 483; s. c. 25 Pacific Rep., 1 (it is proper to allow a witness to be asked on cross-examination to discredit him whether he had not made an argument with a third person for a consideration to suppress the evidence which he had given on the trial, though a witness cannot be impeached by showing particular wrongful acts not bearing on the issue). *Indiana: Pennsylvania Co. v. Bray*, 125 Ind., 229; s. c. 25 Northeast. Rep., 439 (objections sustained to questions on cross-examination as to whether the witness had not been impeached in another case and if a suit for damages was not pending against him for such false swearing). *Massachusetts: Commonwealth v. Sullivan*, 150 Mass., 315; s. c. 23 Northeast. Rep., 47 (in an indictment for illegal sale of liquor the state may cross-examine the defendant, who has offered herself as a witness, as to her identity with a person named in a record of a conviction for a similar offense and offer the record in evidence). *Michigan: People v. Harrison*, 93 Mich., 594; s. c. 53 Northwest. Rep., 725 (it is not error to refuse to allow a further cross-examination as to a female witness' character for chastity, which had been shown to be bad). *Clink v. Gunn*, 90 Mich., 135; s. c. 51 Northwest. Rep., 193 (it is error to permit a witness on cross-examination to be asked as to what he had sworn on a previous trial and as to whether the court had rendered a decree in opposition to what he had testified). *Minnesota: State v. Adamson*, 43 Minn., 196; s. c. 45 Northwest. Rep., 152 (a former conviction of witness for a crime may be shown by cross-examination). *Missouri: State v. Muller*, 100 Mo., 606; s. c. 13 Southwest. Rep., 832 (a witness may be asked as to whether he had been in the penitentiary; it is not necessary to produce the record of conviction). *State v. Houx*, Mo., 1892; 19 Southwest. Rep., 35 (cross-examination of a female witness as to immoralities committed more than twenty years before properly excluded). *New York: Spiegel v. Hays*, 118 N. Y., 660; s. c. 22 Northeast. Rep., 1105 (under Penal Code, § 714, a witness' conviction for a crime may be proved by cross-examination in relation thereto without producing the record of conviction). *Van Bokkelein v. Berdell*, 130 N. Y., 141; s. c. 29 Northeast. Rep., 254 (it is error to allow a witness to be asked on cross-examination, if he has been merely indicted); s. p. *Sullivan v. Newman*, 43 State Rep., 893; s. c. 17 N. Y. Supp., 424; *Walkoff v. Tefft*, 12 N. Y. Supp., 464 (where a witness on cross-examination admitted that he had been convicted of a crime, it was held error not to allow him on redirect to testify as to his innocence thereof, though the record of his conviction was given in evidence). *Palmer v. Manhattan Ry. Co.*, 133 N. Y., 261; s. c. 30 Northeast. Rep., 1001 (upon cross-examination of plaintiff, inquiries to show that she was an habitual litigant were excluded, held no error).

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PEOPLE v. BROOKS.

New York Court of Appeals, 1892.

[Reported in 131 N. Y., 321.]

Bias of a witness may be proved by the adverse party by calling out testimony thereto from other witnesses, without having first laid foundation by calling the attention of the witness impugned thereby to time and place of the acts or declarations relied on as showing bias. But the extent to which such testimony to show bias may be allowed to go is within the discretion of the trial judge.

Upon the trial of Rachel Brooks on an indictment for arson, the principal evidence for the prosecution was the testimony of Charlotte, the prisoner's stepdaughter, who testified to various declarations of the prisoner, in the nature of admissions of the charge.

After the prosecution rested, the defendant was called as a witness in her own behalf and was interrogated as to whether there were not frequent difficulties between herself and her stepdaughter, the object of the counsel being to show bias against her on the part of the stepdaughter. The objection and the ruling of the court appear in the opinion.

The Supreme Court at General Term were of opinion that the ruling was proper and that foundation must be laid by examining the witness charged with bias in reference to the existence of ill feeling before he can be contradicted (citing Starkie on Ev., 213; Wharton on Ev., 566; Stephen's Dig. of Ev., 186; Taylor on Ev., § 1440 *et seq.*; Greenl. on Ev., § 450). The court added, however: We see no good reason why a party should not be permitted to show the hostility and ill feeling of a witness, by such proof as he may have, and, if the witness desires to explain, why he should not do so on the examination of the party calling him, rather than on the examination of the party to whom he is adverse.

The Court of Appeals affirmed the judgment.

EARL, Ch. J. [*on this point said*]: The defendant was called as a witness on her own behalf and these questions were put to her

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by her counsel: "Now state whether or not Charlotte was friendly to you or unfriendly? Did you and Charlotte have frequent difficulties during that time? (meaning the time previous to the fire). Did Charlotte assault you on other occasions previous to the fire?" All these questions were objected to, on the part of the prosecution, as incompetent, because Charlotte had not been examined as to the particular matters inquired of on behalf of the defendant.

The trial judge sustained the objection and excluded the evidence because Charlotte had not been examined as to the same matters, and her attention had not been called to the particular matters inquired of. In making the ruling the trial judge said: "You had the witness here and can ask anything you wish of her that she has not testified to, and if you think she has not told the truth you can ask the witness about it, and I think that is as far as you can go. I think the rule is this: That a witness may be cross-examined as to his or her attitude of mind in regard to the defendant, and his attention must be called to each and all the transactions upon which the counsel for the defendant desires to give evidence.

If the witness admits the acts and declarations that the defendant claims were made and done, that is the end of it. If the witness denies, then I think it is competent to call other witnesses to contradict those matters; but to let a witness go off the stand, not having questioned the witness as to the particulars, and then calling third parties to prove independent transactions showing the attitude of the mind of the witness toward the party, I think is not the rule. So I have allowed and do allow this witness to testify as to any transaction bearing upon that point in regard to which the witness Charlotte was examined." And the judge said further: "I should say that the witness referred to is in court now, so that there is no loss to the defendant by the application of the rule as I understand it." But the counsel insisted upon his right to examine the defendant for the purpose of proving Charlotte's hostility towards her, without first examining Charlotte in reference to the same matter.

We think the rule of law laid down by the trial judge was erroneous. The hostility of a witness towards a party against

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whom he is called may be proved by any competent evidence. It may be shown by cross-examination of the witness, or witnesses may be called who can swear to facts showing it.

There can be no reason for holding that the witness must first be examined as to his hostility, and that then, and not till then, witnesses may be called to contradict him, because it is not a case where the party against whom the witness is called is seeking to discredit him by contradicting him.

He is simply seeking to discredit him by showing his hostility and malice; and as that may be proved by any competent evidence we see no reason for holding that he must first be examined as to his hostility. And such, we think, is the drift of the decisions in this state and elsewhere.

(*Hotchkiss v. Germania Ins. Co.*, 5 Hun, 90; *Starr v. Cragin*, 24 *id.*, 177; *People v. Moore*, 15 Wend., 419; *People v. Thompson*, 41 N. Y., 6; *Schultz v. Third Ave. R. R. Co.*, 89 *id.*, 242; *Ware v. Ware*, 8 Maine, 42, 56; *Tucker v. Welsh*, 17 Mass., 160; *Day v. Stickney*, 14 Allen, 255; *Martin v. Barnes*, 7 Wis., 239; *Robinson v. Hutchinson*, 31 Vt., 443; *New Portland v. Kingfield*, 55 Me., 172; *Hedge v. Clapp*, 22 Conn. 262; *Cook v. Brown*, 34 N. H., 460.) So we think the trial judge laid down an erroneous rule of law.

But we are still of opinion that no harm was done to the defendant. The extent to which an examination may go for the purpose of proving the hostility of a witness must be, to some extent, at least, within the discretion of the trial judge.

We said about it in *Schultz v. Third Av. R.R. Co.* (*supra*), that "the evidence to show the hostile feeling of a witness when it is alleged to exist should be direct and positive, and not very remote and uncertain, for the reason that the trial of the main issue in the case cannot be properly suspended to make out the case of hostile feeling by mere circumstantial evidence from which such hostility or malice may or may not be inferred."

Before these questions were excluded the defendant's counsel, on the examination of Charlotte, proved by her that she and the defendant had had frequent altercations; that the defendant "used to whip her lots of times;" that on a certain occasion, when she was impudent to the defendant, not long before the

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fire, the defendant threw her down, and, on that occasion, the defendant assaulted her and hit her, and pushed and knocked her down on the floor, and, when she got up, she said to the defendant: "You will be sorry; what did I do to you? my mother would not knock me down;" and that her troubles with her stepmother were frequent; that they had trouble on every rainy day; that "she was disagreeable to her on rainy days." And the defendant, before these questions were excluded, testified that a few days before the fire she and Charlotte had an altercation, and that Charlotte got mad and pulled her down and slapped her in the face, and pounded her on the back," so that she fell down and came near fainting away. We think there was ample evidence to show the state of feeling between the defendant and Charlotte, and if the examination of the defendant upon that subject had been much further prolonged, it could not have added any weight to the evidence already given on that subject. Sufficient evidence for every purpose of the trial had been given to show difficulties and hostilities between the defendant and Charlotte, and, therefore, it is clear that the defendant was not harmed by the exclusion of further evidence on that subject.

Besides, the jury utterly disregarded the defendant's evidence. She denied under oath all the evidence tending to implicate her in the crime, and explicitly denied that she had stated to Charlotte her intention to burn the goods in the building, and gave some evidence tending to cast suspicion upon Charlotte as the author of the crime. This is, therefore, a case where the rule laid down in Section 542 of the Code of Criminal Procedure should be applied. That section provides as follows: "After hearing the appeal the court must give judgment, without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties.

[*The learned Chief Judge then disposed of other questions.*]

All the judges concurred.

Judgment affirmed.

NOTE ON RECENT CASES ON EVIDENCE OF BIAS.

Arkansas: Hollingsworth *v.* State, 53 Ark., 387; s. c. 14 Southwest. Rep., 41 (it is error not to allow defendant in a criminal case to prove that a material witness for the state had said that he was working for a reward offered for the conviction of the person who committed the offense). *Georgia*: Allgood *v.* State, 87 Ga., 668; s. c. 13 Southeast. Rep., 668 (upon a trial for forgery it is not admissible to discredit prosecutrix as a witness by showing that someone else had induced her to commence the prosecution). *Illinois*: Bevon *v.* Atlanta Nat. Bk., 1892, 31 Northeast. Rep., 679 (in an action on a note where the defence was forgery a witness for the plaintiff cannot be impeached by showing that he held similar notes). Wischstadt *v.* Wischstadt, 47 Minn., 358; s. c. 50 Northwest. Rep., 225 (to disprove a witness' denial of hostile feeling, some act or declaration indicating that he entertained such a feeling must be shown; it is not enough to prove merely that the witness might have reason for such a feeling; e. g., that the adverse party had brought an action against the witness for slander). *Minnesota*: Holston *v.* Boyle, 46 Minn., 432; s. c. 49 Northwest. Rep., 203 (where a witness was called to prove the bad character of another witness, it is not competent to show that the impeaching witness belonged to an opposing village faction to that which the person concerning whose character he testified belonged; such evidence is too vague and remote). *Mississippi*: Cheatham *v.* State, 67 Miss., 335; s. c. 7 Southern. Rep., 204 (the mere offer of a bribe to a witness, not accepted by him, cannot be proved to discredit the witness).

People v. Gardner, Cal. 32 Pacific Rep., 880 (upon the trial of one charged with an attempted rape where the prosecutrix testified as a witness, it is competent to prove her declaration that she intended to get money out of the defendant if a proper foundation has been laid therefor).

Bates v. Halladay, 31 Mo. App., 162 (evidence tending to show that the adverse party had tampered with a witness is admissible to impeach testimony of such party, but it is error to admit such evidence if no foundation has been laid therefor by first asking the party whether he had made such attempt and giving him an opportunity to explain. Following *Queens Case*, 2 Brad & Bing., 312).

People v. Brooks, 131 N. Y., 321; s. c. 30 Northeast. Rep., 189 (the hostility of a witness towards a party against whom he is called may be proved by any competent testimony; and it is not necessary that the witness should first be examined as to his hostility before calling another witness to prove it).

The rule that cross-examination as to a witness' bias, interest, or hostility is not cross-examination as to collateral matter, and may be proved by other evidence if the witness denies it, is supported by the following recent cases:

Alabama: England *v.* State, 89 Ala., 76; s. c. 7 Southern Rep., 146.

Note on Recent Cases on Evidence of Bias.

Arkansas: Crumpton *v.* State, 52 Ark., 273; s. c. 12 Southwest. Rep., 563. *California*: People *v.* Murray, 85 Cal., 350; s. c. 24 Pacific Rep., 666. *Illinois*: John Morris Co. *v.* Burgess, 44 Ill. App., 27. *Maryland*: Wise *v.* Ackerman, 74 Md., 375; s. c. 25 Atlantic Rep., 424. *Michigan*: Tolbert *v.* Burke, 89 Mich., 132; Langworthy *v.* Township of Green, 95 Mich., 93; s. c. 54 Northwest. Rep., 697. *Missouri*: State *v.* Jones, 106 Mo., 302; s. c. 17 Southwest. Rep., 366. *New York*: Matter of Snelling, 136 N. Y., 515; s. c. 32 Northeast. Rep., 1006; People *v.* Fleming, 14 N. Y. Supp. 200; s. c. 37 State Rep., 65; Effray *v.* Masson, 28 Abb. N. C., 207; s. c. 8 N. Y. Supp., 353; Hamilton *v.* Manhattan Ry. Co., 9 N. Y. Supp., 313. *Texas*: Texas, etc., Ry. Co. *v.* Brown, 78 Tex., 397; s. c. 14 Southwest. Rep., 1034.

In Mitchell *v.* State, 94 Ala., 68; s. c. 10 Southern. Rep., 518, it is held that where on the cross-examination of a witness for the state it is shown that he was indicted with defendant, it is competent for the state in rebuttal to show that no promise had been given the witness to induce him to testify.

Sitterly v. Gregg, 90 N. Y., 686.

SITTERLY v. GREGG.

New York Court of Appeals, 1882.

[Reported in 90 N. Y., 686.]

The credibility of a witness may be assailed by a contradiction of testimony drawn out from him on cross-examination as to a *material* point.

Where a witness on cross-examination had denied that the party on whose behalf he was called was present at a transaction, his presence at which would have tended to show acquiescence in or admission of a material fact, *held*, that the cross-examining party was not bound by the answer, but could give evidence to the contrary.

The plaintiff sued on notes, one of which was thirteen years old, and defendant contended that they had been paid. There had been other loans and notes between the parties.

The contention on the merits was as to whether a note of \$300 was paid before the time of an interview had by plaintiff with defendant Andrew and his brothers, James and John. [Reported in 22 Hun, 258.]

James was called as a witness for defendant, and testified that the note in question had been paid some ten years ago; but was not surrendered, plaintiff saying she could not then find it. He also testified that at an interview for the purpose of accounting, at a time long after the alleged payment, he, James, cast the interest on the note in question with the others. On cross-examination he testified that Andrew, the defendant, was not present at that interview.

The main question on appeal was whether Andrew's presence was a collateral fact, as to which the cross-examining party was bound by the answer, or whether it was material and could be contradicted.

FINCH, J. [*on this point said*]: The plaintiff, in her recital of the interview and accounting at her mother's, stated that his (defendant's) brothers, James and John, were present, and that James did the figuring at her request. He was called as a witness for the defendant, and testified that the \$300 note was actually paid within three or four years after it was given by the defendant, and the note was not at the time surrendered,

Sitterly v. Gregg, 90 N. Y., 686.

because the plaintiff said she could not find it. On cross-examination his attention was drawn to the occurrence at his mother's, the day after the meeting at O'Neill's.

If the plaintiff's version of that transaction was true, it tended to contradict strongly the story of the witness, that he saw Andrew previously pay the note, for it is inconceivable, if such payment was in reality made, that James would cast the interest on all three notes in the presence of Andrew, the latter taking part in the transaction, and all parties tacitly conceding, and no one disputing the validity of the \$300 note as an outstanding debt and element of the computation. Under the cross-examination, directed to this occurrence, James admitted that he met the plaintiff at his mother's on the day specified; that the note of \$300 was referred to, and he figured the interest on it at plaintiff's request; and that he figured on several amounts for her. So far he corroborated her statement, and would have completed a substantial contradiction of his own evidence in chief but for a denial which followed. He said that the defendant was not present on that occasion. He was then asked if he had not said that Andrew was so present to O'Neill, and answered in the negative. O'Neill was subsequently called and permitted to testify that the witness did so state, under the defendant's objection that the fact inquired about was collateral, and the evidence incompetent. We think the fact inquired about was not a collateral fact within the rule, but one material to the issue of payment, and, if true, tended, when taken in connection with the admissions of the witness, to contradict his evidence in chief, for it is impossible to believe, if James and Andrew both knew the note to have been paid, that the former would have figured the interest on it, and the latter taken part in the transaction, but neither uttering protest or dissent. All this would have followed and been unanswerable, if Andrew was admitted to have been present, unless some further modifying proof was given. While the latter also denied being present, he confesses that the appointment was made the day before at his request. The collision, therefore, was upon an important and material point, and the fact sought to be drawn from James bore directly upon the issue of payment, and tended to contradict him upon a material matter, and where that is the

case the credibility of the witness may be assailed by showing a contrary statement made elsewhere. (*Carpenter v. Ward*, 30 N. Y., 243; *Schell v. Plumb*, 55 *id.*, 592; *Patchin v. Astor Mut. Ins. Co.*, 13 *id.*, 268.) The cross-examination of the witness was not as to immaterial matter. It was upon an occurrence vital to the issue of payment, and to the testimony upon that issue which the witness had given on his direct examination. We think, therefore, the evidence of O'Neill was competent, and no error was committed in its admission.

All the judges concurred, except TRACY, J., absent.

Judgment affirmed.

NOTE.—In *Badger v. Badger*, 88 N. Y., 546; rev'g 13 Weekly Dig., 35, an action for dower, the issue being as to the marriage of plaintiff and decedent, sought to be proved by evidence of cohabitation and repute, in opposition to proof that during the same period, the decedent was known among his friends and relatives as a bachelor, a witness for plaintiff testified to a conversation with decedent at the house of a sister of the latter where he said he was a married man, but it would not do to let the women know it. Upon cross-examination the witness denied that at another time, the decedent, in presence of his sister, said he was a bachelor. The defendant afterward called the sister. *Held*, that as against a general objection, it was proper to allow her to testify to the latter statement of the deceased, it being expressly received for the purpose of contradicting the plaintiff's witness, and not as a declaration of deceased.

The declaration was not immaterial within the rule that an answer on such matter is conclusive (*Dist'g Van Tuyl v. Van Tuyl*, 57 Barb., 241; *Matter of Taylor*, 9 Paige, 614).

MATTER OF WILL OF SNELLING.

New York Court of Appeals, 1893.

[Reported in 136 N. Y., 515.]

If an objection is so stated that it may fairly be assumed that the precise ground was understood, though indirectly or obscurely expressed, it may be held on appeal sufficient in form.

Bias of a witness is material; and counsel cross-examining a witness as to statements or acts showing bias is not concluded by the answers of the witness, but after foundation laid* may contradict the testimony by other witnesses.

Application for the probate of the will of Mary Snelling,

* That there is no necessity of laying foundation, see *People v. Brooks*, p. 711 of this vol.

contested by her nephews and nieces on the ground of incapacity and undue influence. On the hearing, two witnesses were produced by the contestants for the purpose of sustaining the objections made to the probate of the will, who testified at great length to various acts, conversations and transactions of the testatrix, tending to establish undue influence and incapacity. This testimony extended over some years prior to the execution of the will, and much of it had no bearing upon the issues, as may well be inferred from the fact that it covers over fifty printed pages in the record. The proponents then called two physicians, who both testified that they had read the whole of the testimony of the two witnesses referred to above, giving the names of these witnesses, and to each of them in succession the following question was propounded: "Assuming their testimony to be true, and basing your opinion upon such testimony, what would you say as to the mental condition of Mary Snelling, say in June, 1890?"

Objected to as irrelevant and immaterial, and that the witness is debarred from answering the question as laid down by the Court of Appeals in the case of *People v. McElvaine*.^{*} Objection overruled and exception taken.

A. "I should say she was perfectly sane."

The Surrogate of Suffolk admitted the will to probate.

The Supreme Court at General Term affirmed the decree without opinion on this point.

The Court of Appeals reversed the judgment.

O'BRIEN, J. [*after stating facts.*] This question [the one above given] was objected to by the counsel for the contestants; and while the form in which the objection was made is quite inartistic, there can be no doubt as to what was intended, and we think was sufficient to challenge the competency of the testimony sought to be elicited. The surrogate overruled the objection, and an exception was taken. The witness in each case then answered: "I should say she was perfectly sane." It is needless to enter upon any reasoning or discussion to show that this question was

^{*} Reported in 121 N. Y., 250. The ruling there was against an hypothetical question referring to evidence as heard by the witness.

improper, as this court has more than once condemned this method of eliciting opinions from experts. (*Reynolds v. Robinson*, 64 N. Y. 589, 595; *People v. McElvaine*, 121 *id.* 250; *Link v. Sheldon*, 136 N. Y. 1.) And it would be difficult to imagine a plainer breach of the rule than is presented by the question propounded to the witness in this case. The principle is not changed by the circumstance that all the testimony embraced within the sweeping terms of the question was before the court, or by the fact that the mass of testimony upon which the opinion was based came from witnesses of the opposite party. The necessity of a specific question, at the time of the examination of the witnesses, covering all the facts, or assumed facts, upon which the opinion of the expert is required, is as apparent in such a case as in any other.

One of the subscribing witnesses to the execution of the will was a neighbor of the persons, husband and wife, in whose favor the will was made, and she attended at the time the will was executed, at the request of the wife, who was one of the beneficiaries under the will. About the time of the hearing upon the contest before the surrogate this subscribing witness was visited by a woman who, under an assumed name and without disclosing her real purpose, had been procured by the contestants or their counsel to elicit admissions from her for use upon the trial. The subscribing witness, after having testified to what took place at the execution of the will, and that the testatrix was at the time apparently rational, was subjected to a long cross-examination with reference to the interview with the visitor above referred to, for the purpose of laying a foundation for impeaching her testimony. Many of the questions put to the witness in the course of this exceedingly prolix and discursive examination were properly excluded by the surrogate. She was asked, however, in substance, if Mrs. Cook, who was one of the beneficiaries under the will and interested in its probate, and who had procured her to attend as a witness to the will, had not promised her money or some reward in the case, and she answered the question in the negative. Subsequently the woman who sought the interview in the interest of the contestants, was called as an impeaching witness, and in various forms was asked

Van Tassel v. N. Y., L. E., etc., R.R. Co., 20 N. Y. Supp., 708.

if the subscribing witness had not so stated in the interview, and other questions tending to impeach her, which were excluded under exception.

The interest which a witness has in the subject of the controversy is a material inquiry, as it bears upon the question of credibility, and where a witness has received or has been promised any reward for giving testimony in a case, the fact may be shown upon cross-examination, and if denied, admissions or declarations out of court to that effect may be proved. The relations which the witness bears to the case are so far relevant to the issue as to admit proof of contradictory statements by way of impeachment when the proper foundation is laid. (1 Green. on Ev. § 450; *Newton v. Harris*, 6 N. Y. 345; *Stark v. People*, 5 Denio, 106.)

Many of the questions propounded to the impeaching witness were so framed that their purpose or meaning was not quite clear, or they were so intermingled with other matters that they were properly excluded, but with respect to the interest which the subscribing witness had in the establishment of the will, the contestants were not permitted to make such inquiry as they were entitled to. The very questionable methods used to procure the impeaching testimony might well affect its credibility with the surrogate, but could not affect its competency. An error in admitting or excluding evidence in such a case is not sufficient to reverse the decree of the surrogate, unless it appears that the party against whom the ruling was made was necessarily prejudiced thereby. (Code, § 2545.)

The rulings referred to related to important testimony in the case, and, at least in some degree, must have been prejudicial to the contestants. For these reasons, the judgment of the general Term and the decree of the surrogate should be reversed and a new trial granted, costs to abide the event.

All the judges concurred.

Judgment reversed.

NOTE.—In *Van Tassel v. New York, Lake Erie & W. R.R. Co.*, 20 N. Y. Supp., 708, it was held that the use of an alleged book of entries, which a witness testifies were regularly made according to their dates in the course of his professional service, which he produces and testifies to in

Note of Cases against Contradicting Collateral Matters drawn out on Cross.

support of his testimony to facts which he swears were observed by him and of which an entry appears in the book, is not collateral matter; but the testimony of the witness given on cross-examination, in respect to the entries of other consultations there entered, may be contradicted and the book of entries impeached by testimony of an expert that all the entries were made at one time.

NOTE OF RECENT CASES AGAINST CONTRADICTING COLLATERAL MATTERS DRAWN OUT ON CROSS-EXAMINATION.

The rule, that a party cross-examining a witness as to collateral matters is concluded by the witness' answer, and cannot contradict him by other evidence, is supported by the following cases:

California: *People v. Tiley*, 84 Cal., 651; s. c. 24 Pacific Rep., 290; *People v. Webb*, 70 Cal., 120; 11 Pacific Rep., 509; *Barkley v. Copeland*, 86 Cal., 483; 25 Pacific Rep., 1. *Georgia*: *Futch v. State*, 90 Ga., 472; 16 Southeast. Rep., 102. *Illinois*: *Lake Erie, etc., R. Co. v. Morain*, 140 Ill., 117; s. c. 29 Northeast. Rep., 869; *Lochnitt v. Stocken*, 31 Ill. App., 217. *Kentucky*: *Commonwealth v. Hourigan*, 89 Kentucky, 305; s. c. 12 Southwest. Rep., 550. *Louisiana*: *State v. Donelson*, 1893, 12 Southern Rep., 922. *Massachusetts*: *Commonwealth v. Jones*, 155 Mass., 170; s. c. 29 Northeast. Rep., 467. *Michigan*: *People v. Hillhouse*, 80 Mich., 580; s. c. 45 Northwest. Rep., 484. *Nebraska*: *Carter v. State*, 1893, 54 Northwest. Rep., 853. *New York*: *Surdam v. Ingraham*, 12 N. Y. Supp., 798; *Hill v. Froeleck*, 14 *id.*, 610; s. c. 38 State Rep., 616; *Van Tassel v. N. Y., Lake Erie, etc., R. Co.*, 20 N. Y. Supp., 708; s. c. 48 State Rep., 767; 1 Misc. R., 299. *United States*: *Union Pac. R. Co. v. Reese*, 56 Fed. Rep., 288.

Fisher v. Monroe, 2 Misc., 326.

FISHER v. MONROE.

New York Court of Common Pleas, 1893.

[Reported in 2 Misc. (Delehanty), 326.]

The rule that foundation must be laid by calling the attention of the witness on cross-examination, to time, place, etc., before proving previous statements, inconsistent with present testimony, does not apply to statements of a party to the action.

An exception to the refusal to allow such statements of a party to be proved until the party has been recalled and foundation laid, is not waived by yielding and recalling and cross-examining the party for that purpose.

Action by an actress for breach of contract of employment.

The chief question litigated was whether she had sufficient excuse for non-attendance at a rehearsal.

In aid of their contention, the defendant's counsel offered plaintiff's cross-examination on a previous trial in evidence, to prove admissions by her as to whether or not she was ill or merely tired out, and also to prove her admissions as to her duties as an actress upon rehearsals.

The court excluded the evidence unless the attention of the witness was first called to what she had testified to on the former trial. The defendant's counsel thereupon stated to the court that it was not for the purpose of impeaching the witness, but to prove admissions made by her. Still the court would not allow him to do so, and defendant's counsel excepted.

Plaintiff recovered a verdict.

The Court of Common Pleas reversed the judgment.

BOOKSTAVEN, J. [*after stating facts*]: It is well settled that an admission made at one stage of an action, binds the parties at all subsequent stages as primary evidence. *Larrison v. Payne*, 23 N. Y. St. Repr., 438; *Scofield v. Spaulding*, *id.*, 108; 54 Hun, 523; *Tooker v. Gormer*, 2 Hilt., 71. The rule which makes it incumbent upon the cross-examining counsel first to direct the witness' attention with reasonable precision to, and interrogate him respecting, an alleged contradictory statement before the

latter may be given in evidence (*Crane v. Hardman*, 4 E. D. Smith, 448; *Everson v. Carpenter*, 17 Wend., 419; *Root v. Brown*, 4 Hun, 797), does not apply to parties to the action (*Kennedy v. Wood*, 52 Hun, 46, 22 N. Y. St. Repr., 132; *Boehm v. Miller*, 45 *id.*, 281); and as to them the alleged contradictory statement is admissible as a declaration as against interest. *Cook v. Barr*, 44 N. Y., 156; *Williams v. Sergeant*, 46 *id.*, 481.

And in *Meyer v. Campbell*, 1 Misc. Rep., 283, we held that though the statement be a part of a pleading which has been superseded by the service of an amended one, it could still be given in evidence. In the same case we held that the defendant had the right to offer, and it was error to exclude, plaintiff's deposition taken *de bene'esse*, which was at variance with the allegations of the amended complaint, although that deposition was not competent in plaintiff's favor, since he was present at the trial, but on the ground that it was a declaration against his interest.

It was, therefore, error to exclude the cross-examination of the plaintiff on the former trial, as far as that related to the questions at issue on this trial.

Nor was this error cured by afterwards admitting portions of it in rebuttal in order to impeach the witness, as it must be apparent that the force of the evidence was greatly weakened by the cross-examination imposed on defendants as a preliminary, and the jury might well have been misled as to its weight and effect in consequence; for such a course is very likely to prejudice the minds of a jury, especially in the case of a lady on account of the necessarily unpleasant position in which the party is placed thereby, and the apparent harshness of such a course. Besides, the admission was not as broad as the former offer of the defendants.

Judgment reversed.

Rockwell v. Brown, 36 N. Y., 207.

ROCKWELL v. BROWN.

New York Court of Appeals, 1867.

[Reported in 36 N. Y., 207.]

To lay the foundation for proving statements previously made by the witness, inconsistent with his present testimony it is enough if his attention is directed with reasonable certainty to the occasion of the imputed conversation: to call his attention to the time, place and person, or to person and time, is enough.

An action for slander.

The complaint alleged that defendant, in the presence of divers good and worthy citizens, stated that plaintiff stole his cow.

The answer set up the facts and circumstances under which the cow was taken by the plaintiff, in bar of the action and also in mitigation of damages.

Upon the trial Josiah Hopkins, a witness for the defendant, on his cross-examination, was asked: "Did you tell him (plaintiff's father, Peter Rockwell), at his house, last July, that Brown told you that plaintiff stole his cow?" The witness answered: "I did not tell him so; I know what I did tell him."

The plaintiff then called Peter Rockwell, who testified that he knew Josiah Hopkins, "he was at my house in July last." He was then asked this question: "Did Josiah Hopkins tell you in July last that defendant told him that plaintiff stole defendant's cow?"

The defendant objected on the grounds: 1. That the question does not confine the witness to any place of the alleged conversation. 2. It does not refer to the time when Hopkins had the conversation with Brown at Underwood's, testified to. 3. That it is immaterial.

Plaintiff recovered.

The Supreme Court at General Term affirmed the judgment.

The Court of Appeals affirmed the judgment.

DAVIES, Ch. J. [*said on this point, after stating facts*]: Neither of these grounds are tenable. Preliminary to the ques-

Rockwell v. Brown, 36 N. Y., 207.

tion, the witness had testified that he knew Hopkins, and that Hopkins was at his house in July last. The question was then put in the form above quoted. I think there was a sufficient indication of the place at which the conversation was had, and the whole answer of the witness points unerringly to the conversation at his house, of which Hopkins had been inquired about. The ruling of the referee falls within the doctrine laid down by this court in *Pendleton v. Empire Stone Dressing Company* (19 N. Y., 13, 18). The witness Hopkins had his attention called with reasonable certainty to the conversation with Rockwell, and it is manifest that the latter witness referred, in his testimony, to the same conversation of which Hopkins had been inquired about.

The judgment appealed from should be affirmed, with costs.

BOCKES, J. [*said on this point*]: The question put to the witness, Rockwell, with a view to affect the credibility of Hopkins, who had been examined on defendant's behalf, was, I think, admissible. Hopkins had denied telling Rockwell in July that the defendant said the plaintiff stole the cow. Rockwell was then called and asked if Hopkins did so tell him in July, and answered that he did. The subject-matter to which Hopkins had testified, and in regard to which it was proposed to contradict him, was relevant to the issue. The only question is, whether his attention was sufficiently directed to the conversation, in which he made the statement imputed to him. It has been long settled that it is not sufficient to inquire generally of a witness, with a view to affect his credibility by contradicting him, whether he ever made the specific statement, without naming person, time or place. His attention should be called to the occasion to enable him to explain, or exculpate himself in regard to the imputed contradiction. How specific the cross-examination should be in such case was considered by Judge Denio in *Pendleton v. Empire Stone Dressing Co.* (19 N. Y., 13) where it was held that the occasion of the supposed conversation should be pointed out to the witness with reasonable certainty, as by indicating the place, the purpose of the interview or other circumstance likely to call it to the mind of the witness. As a

Pendleton v. Empire Stone Dressing Co., 19 N. Y., 13.

general and safe rule of examination, the time and place as well as the person should be named; but it seems that each and all of these are not absolutely essential, when the occasion is clearly indicated by other circumstances. In this case Hopkins was asked whether he told Rockwell at his house, in July, that the defendant said the plaintiff stole the cow. He answered: "I did not tell him so." He also stated that he did not tell him that last July. Here his attention was called to person, time and place in one instance, and to person and time in the other. The occasions were, therefore, sufficiently specified to admit of contradiction as to either statement within the rule laid down in *Pendleton v. Empire Stone Dressing Co.*, above cited.

The judgment should be affirmed.

All the judges concurred.

NOTE.—In *Pendleton v. Empire Stone Dressing Co.*, 19 N. Y., 13, DENIO, J., said: The question then is, whether it is sufficient to inquire of a witness whether he has not made specific statements, contradictory to the testimony he has given, to an individual named, without mentioning time, place or other circumstance, in order to lay the foundation for giving in evidence such contradictory statements. The reason for requiring that a witness, whose credit it is intended to attack by the proof of contradictory statements, should be first examined respecting them, is according to the unanimous opinion of the judges in the Queen's case, that he may be enabled to give such reason, explanation or exculpation as the circumstances of the transaction may happen to furnish. (2 Broad. & Bing., 313.) It did not fall within the purpose of the judges to declare how specific the cross-examination for such a purpose ought to be, the question being whether he should be required to be examined as to the fact whether he had ever made such declarations. In *Angus v. Smith* (1 Mood. & Malk., 473), the witness attempted to be contradicted, denied, on cross-examination, that he had ever said what was imputed to him, but no name of any person had been suggested to him as the party to whom he had made the supposed statement. It was then proposed to prove a statement made to a particular person; but the court held that a sufficient foundation had not been laid. The Chief Justice said: "I understand the rule to be that, before you can contradict a witness by showing that he has, at some other time, said something inconsistent with the present evidence, you must ask him as to the time, place and person involved in the supposed contradiction." In a note by the reporter, it is stated that the general practice, since the Queen's case has been in conformity with the rule as above stated by Chief Justice Tindal. That rule was referred to as the one which should govern in such cases in the late Supreme Court, in *Davis v. Kimball* (19 Wend., 437). The general rule that the attention of the witness

to the impeached must be in some sufficient manner called to his alleged conflicting declarations, has been frequently stated and affirmed in this court, though it has not become necessary to state the extent to which the cross-examination must be carried. (Patchen v. The Astor Mut. Ins. Co., 3 Kern., 268; Stacy v. Graham, 4 *id.*, 492.) The rule, as laid down by Chief Justice Tindal, is generally referred to as the true one by writers on the law of evidence. (Cow. & Hill's Notes, 774; 1 Greenl., 462.) I am not aware that any case has been presented to the courts where the name of the person to whom the declaration supposed to have been made, and nothing more, has been stated in the cross-examination of the principal witness, though the dicta of judges and of writers, as we have seen, tends strongly to the conclusion that this alone would not be considered sufficient. I conceive, therefore, that we are at liberty to lay down the rule which ought to be observed in such cases, and I am of the opinion that the occasion of the supposed conversation ought to be pointed out with reasonable certainty on the cross-examination of the witness whose credit is to be attacked by the proof of the contradictory statements. It cannot of course, be necessary that the precise date should be indicated, as that must often be difficult to ascertain, and if ascertained, would not be likely, of itself, to recall the circumstance to the witness; but the place could easily be indicated and the occurrence identified by a statement of the purpose of the interview or other circumstances, which would recall it to the mind of the witness, if the conversation inquired of actually took place. It is obvious that the cross-examination, in this instance, did not come within the reason of the rule as thus defined, and that the judge was justified in excluding the declaration offered.

ROMERTZE v. EAST RIVER NAT. BANK.

New York Court of Appeals, 1872.

[Reported in 49 N. Y., 577.]

To lay the foundation for proving written statements previously made by the witness, inconsistent with his present testimony, it is enough that while under cross-examination he is shown the paper and admits that he wrote or signed it and knows its contents.

The proper mode of proving its contents is to read the paper in evidence. It is not competent to read particular parts to the witness and ask him if he so stated.

It is not necessary to put the paper in evidence at the time of cross-examination; but the cross-examining counsel may reserve it and put it in evidence afterward, and this is the more orderly course.

Nor is it necessary to call his attention while under cross-examination to the particular parts which are deemed contradictory.

Romertze v. East River Nat. Bank, 49 N. Y., 577.

The witness or the party calling him has not a legal right to enter into any explanation of the contents of the paper until after it has been introduced in evidence.

Upon the trial of this cause Zenos E. Newell, cashier of the defendant bank (whose evidence in this case had been taken *de bene esse*), was present in court, and was called and examined as a witness for defendant.

On cross-examination he testified, "I believe I was sworn before as a witness in this case. [Deposition shown him.] That is my signature. The deposition was read over to me before I signed it."

After defendant's counsel rested, plaintiff's counsel offered to read in evidence the testimony of Newell, taken *de bene esse* in this action, for the purpose of showing that he made statements therein inconsistent with his testimony on the stand in court on this trial. Objected to on the ground that the proper foundation had not been laid for reading the deposition; and on the further ground that the witness was then present in court, and had already been examined orally as a witness in court on this trial, and on the further ground that the proper foundation had not been laid for reading the deposition for the purpose of contradicting the witness.

Objection sustained. Exception taken.

At the trial term defendant recovered.

The Superior Court at General Term affirmed the judgment, saying that the witness had not been examined in respect to it, the deposition, further than to prove his signature. It had not been read to him, nor was he in any manner apprized of the purpose for which it was proved, or the use it was intended to make of it. He had, therefore, no opportunity to enter into explanations, or correct mistakes, if there were any. If the rule which requires as a preliminary to impeachment, that the attention of the witness should be called to the subject matter, means anything, and is designed to protect the witness from surprise or misunderstanding, then enough was not done in this case to make the evidence admissible. At least the parts of the deposition,

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claimed to be contractions of his evidence on the stand, should have been read or pointed out to him. [Citing 1 Phil., ev., 27; Clapp v. Wilson, 5 Den., 285; Hubbard v. Briggs, 31 N. Y., 518; Stephen v. People, 19 N. Y., 549; Newcomb v. Griswold, 24 N. Y., 298.]

The Court of Appeals reversed the judgment.

CHURCH, CH. J. [*on this point said*]: The only question of law which seems to deserve attention relates to the attempt to prove that the witness, Newell, called by the defendant, had made statements on another occasion inconsistent with those testified to by him on the trial. This evidence had been taken *de bene esse* in the same action, and on cross-examination the deposition was shown to him, and he stated that he signed it, and that it was read over to him before he signed it.

After the defendant rested, the plaintiff's counsel proposed to read the deposition, "for the purpose of showing that he made statements therein is inconsistent with his testimony given on the stand in court on his trial." The court excluded it, on the ground, as we must presume from the objection, and what took place subsequently, that a proper foundation had not been laid for the purpose of reading the deposition to contradict the witness. We think the court erred in rejecting the deposition. The paper was shown to the witness; he verified the signature and stated that it was read over to him before he signed it. It is to be presumed that he understood it. What more should have been done? It was not competent to repeat particular sentences and ask if he testified to them, because the paper was the best evidence of what it contained. It was not incumbent upon the plaintiff's counsel to ask for explanations, nor to introduce the paper in evidence at that time. If he desired to ask the witness questions with reference to it, the court might, in its discretion, permit its introduction at that time, but the regular course was to wait until his turn came to put in evidence, and this he did.

It is said that the letter should have been introduced in evidence at the time, so that the witness might either explain his evidence or the statements contained in the paper. Without

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determining whether the court might, in its discretion, permit that course, the orderly way was to withhold the paper until the party had the right to produce evidence on his part. It was his evidence, and strictly he had no right to produce it until the other party rested, and he took the case. The witness could then be recalled and make any explanation he might have. Neither his rights nor that of the party would have been interfered with by this course. In the case of oral declarations out of court, the contradicting witnesses are never called until the party proposing to introduce them has the right to produce evidence on his part, and the explanations of the witness sought to be impeached are usually given after that, although the court may sometimes vary the order of evidence as a matter of discretion. The rule is substantially the same in both cases, except as it is necessarily varied by the nature of the impeaching evidence. As to oral declarations, the attention of the witness must be called to the time and place, and particular language used, in order that he may recall the circumstances and make an intelligent answer; but, as to written statements, this is unnecessary, when the witness is shown the paper itself, and admits that he wrote or signed it and knows its contents. The rule indicated preserves the orderly course of the trial, and does no injustice to the witness or either party, and such, I understand, to be the rule sanctioned by authority. In 2 Greenleaf on Ev., §463, it is said that if the witness "admits the letter to be his writing, he cannot be asked whether statements, such as the counsel may suggest, are contained in it, but the whole letter must be read as the only competent evidence of that fact. According to the ordinary rule of proceeding in such cases, the letter is to be read as the evidence of the cross-examining counsel in his turn, when he shall have opened the case."

The same rule is laid down in 2 Phillips on Ev., 807. In *Clapp v. Wilson*, 5 Denio, 288, the court said: This being a sworn statement in writing, it was not necessary to call the attention of the witness in the first instance to the statements in it, which were intended to be relied on with a view to explanation.

This is only necessary when naked, contradictory statements

are referred to for the purpose of impairing the confidence in the witness." In that case the paper had been shown to the witness, and the signature admitted, and it was objected on the argument that it had not been read in evidence on the trial. The court assumed that it had; and held that it was unnecessary to call the attention of the witness, in the first instance, to particular passages contained in it for the purpose of explanation, and, we think, held correctly, although, from the language used, without reference to the facts, it might be inferred that it was unnecessary to call the attention of the witness to the paper at all. The learned judge who delivered the opinion of the court below claims that these authorities have been overruled, and the rule changed by this court. With great respect, I cannot agree with him. He refers, to establish this, to *Hubbard v. Briggs* (31 N. Y., 518); *Stephens v. The People* (19 *id.*, 549); *Newcomb v. Griswold* (24 *id.*, 298). In the first case (*Hubbard v. Briggs*) the testimony of a deceased witness was read by stipulation; and it was then proposed to read a deposition made by him in another action to contradict his testimony. This court held this to be incompetent, because the attention of the witness had not been called to the statements proposed to be read. The manifest distinction between that case and this is, that in this case the attention of the witness was called to the deposition proposed to be read; he knew its contents, and had, or would have, every opportunity for explanation, while, in that case, the attention of the witness was not called to the paper at all, and no opportunity was or could be afforded him for explanation. The point determined here was not up in that case. The proper time for explanation is after the paper has been read; and that, as we have seen, is when the party proposing to offer it can introduce evidence on his part, and the attention of the witness is sufficiently called to it in the first instance by showing it to him, and giving him an opportunity to know what it is, and his admitting or denying its authenticity. These points were not in the case, nor discussed. In *Stephens v. The People* (19 N. Y., 549) the court below had permitted such parts of the deposition taken before the coroner of two witnesses to be read as had been called to their attention during their examination, and rejected the other

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parts. The court held that this was not error; but, if it was, it was cured by the subsequent introduction of the whole deposition; and it was also held that the introduction of the deposition of another witness was not error, as there was no objection made that the attention of the witness was not called to it.

It cannot be claimed that the court intended to decide that the attention of the witness would not be sufficiently called to the paper by what took place in this case. No such point was presented, and the language of the court must be referred to the facts of the case. In *Newcomb v. Griswold* it was merely held that a witness is not bound to answer as to matters reduced to writing by himself or another, and subscribed by him, until after the writing has been produced and read or shown to him. The supposed conflict between the authorities is attributable more to the apparent difference of expression than to a deliberate intent to change the rule. In neither case does the court discuss the rule above alluded to, or cite any authorities, or intimate an intention to change or modify the rule laid down in the elementary books. The result of all the authorities is that it is sufficient for a party, proposing to impeach a witness by proving inconsistent written statements, to show him or read to him the paper; and if its genuineness is admitted, to introduce it, when he has a right to put in evidence; and that it is not the legal right of the other party or the witness to enter into any explanation of the contents of the paper until after it has been introduced in evidence. The court may doubtless permit the explanation, in the first instance, and may vary the order of proof in this as in many other cases for the purpose of eliciting truth and preventing injustice. Many questions of this character are within the discretion of the court; but here the plaintiff pursued the usual and legal course. The witness admitted the genuineness of the paper and knew its contents. His attention was sufficiently called to it. Neither he nor the defendant asked the privilege of explanation, nor demanded the reading of the paper. The plaintiff offered the paper at the right time, and it was error to reject it. The court not only refused to permit the introduction of the paper on the ground that no foundation had been laid, but after the plaintiff had recalled the witness for the purpose of

laying the foundation, refused to permit the necessary questions to be put to him, on the ground that it was discretionary with the court to allow a witness to be recalled. Whether such an exercise of discretionary power against a party is not legal error it is not requisite to determine, as the recall of the witness was unnecessary.

The deposition offered in evidence is not before us, and we cannot, therefore, say that the plaintiff might not have been prejudiced by its rejection. The result may have been the same, but there is no legal rule by which we can so determine. For the error in rejecting it, the judgment must be reversed and a new trial ordered, costs to abide the event.

All the judges concurred.

Judgment reversed.

MATTER OF HESDRA.

New York Court of Appeals, 1890.

[Reported in 119 N. Y., 615.]

It seems that after an attested instrument has been sought to be proved by evidence of the handwriting of a deceased subscribing witness, the adverse party may prove declarations of the alleged subscribing witness, inconsistent with the attestation, by way of impeachment thereof.

A will may be proved by other evidence, notwithstanding the subscribing witnesses testify that it was not regularly executed.

Proof of circumstances, with a regular attestation clause, are enough if the tribunal is thereby satisfied of the factum.

When an effort has been made to impeach the testimony of a witness by evidence that he has made statements inconsistent therewith, which are attributed to a wrongful motive, or suggested to be fabrications of a later date than the fact, it is competent to corroborate his testimony by showing that he made declarations to the same effect as his testimony, when he was not under any such motive, or before the time of the suggested fabrication.

The same rule allows such corroboration of the attestation of a subscribing witness, where his statements contradictory of the attestation have been given in evidence.

Probate of the will of Edward D. Hesdra was contested by Mrs. Tordoff (claiming to be a niece of testator), and also by the

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state, claiming that she was not a niece and that the estate of testator has escheated, it being conceded that unless Mrs. Tordoff is such niece, the testator died without heirs.

The contest turned principally upon the question of the genuineness of the signatures of "E. D. Hesdra" and "Thomas Frothingham" to the will.

Facts appear in the opinion.

The Surrogate decided in favor of their genuineness and admitted the will to probate.

The Supreme Court at General Term affirmed the decree.

BARNARD, P. J., said: The admission of evidence of declarations of John V. Onderdonk to the effect that the testator had made a will, in reply to such admissions that he had not, if erroneous, have no sufficient effect in the case to reverse the judgment for that reason.

The Court of Appeals affirmed the decree.

RUGER, Ch. J. [*said on this subject*]: Some question has been made by the respondent as to the competency of the declaration of a subscribing witness to impeach the execution of a will, but the case of *Losee v. Losee* (2 Hill, 612), seems to be an authority for the admissibility of such evidence. It is there said that "proof of the signature of a deceased subscribing witness is presumptive evidence of the truth of everything appearing upon the face of the instrument relating to its execution, as it is presumed the witness would not have subscribed his name in attestation of that which did not take place. But this presumption may be rebutted, and hence the propriety and even necessity of permitting him to be impeached in the usual mode, as if he were living and had testified at the trial to what his signature imports. The reason for admitting such evidence in a case like the present was stated by BAYLEY, J., in *Doe v. Ridgway* (4 Barn. & Ald., 52), thus: He (the attesting witness to a bond) must have been called, if he had been alive, and it would then have been competent to prove by cross-examination his declarations as to the forgery of the bond. Now the party ought not,

by the death of the witness, to be deprived of obtaining the advantage of such evidence.”

The competency of this evidence is supported by an able note to the case from the learned reporter of the court, who was peculiarly qualified to discuss questions relating to rules of evidence.

Assuming, therefore, for the purpose of this decision that all the evidence produced by the appellant was competent, and that the declarations of a subscribing witness are competent to impeach its execution, a question which we do not decide, as the decision being in favor of the appellant it becomes unnecessary to do so, we proceed with the examination of the case. The declarations of the subscribing witness Onderdonk, tending to show the forgery of the various signatures thereto, affected the credibility of the witness alone, and had no other effect than to impair the force of his signature as evidence of the performance of the conditions stated in the attesting clause, and still left the question of fact, whether the will was properly executed, to be determined by the trial court upon all the evidence of the case. Assuming as we must, under the findings of the court, that all of the signatures to the will were genuine, it remained for the trial court to determine whether the contradictory declarations made by one of the witnesses thereto, subsequent to its execution, were of such a character as required the surrogate to refuse probate to the will. Such declarations could have no greater effect than the positive evidence of the witness upon the stand to the same effect, and yet, even under such circumstances, wills have frequently been admitted to probate upon corroborating evidence derived from circumstances. (Matter of Cottrell, *supra*, and cases there cited.)

The code expressly provides that the proof of a will may be established when a subscribing witness has forgotten the occurrence of its execution, or testifies against it, upon proof of the handwriting of the testator and the subscribing witnesses, and of such other circumstances as would be sufficient to prove the will upon the trial of an action. (§ 2620.) This section received a practical construction in *Brown v. Clark* (77 N. Y.), 369; *Matter of Pepoon* (91 *id.*, 255), and *Matter of Cottrell*

(95 *id.*, 329), and was held to mean, in accordance with prior decisions cited, that the proof of circumstances bearing upon the question of the authenticity of the will in connection with a regular attestation clause, duly executed, were, if sufficient to satisfy the court of its genuineness, all that was required to sustain the probate of a will. In the Cottrell Case the probate was sustained where both of the subscribing witnesses denied the genuineness of their signatures to the attestation clause, as well as the performance of conditions required by the statute. [The learned Chief Judge here reviewed the condition, situation and relation of the parties, the disposition of property made by the will, and the other circumstances bearing upon the probabilities of the case, saying also] :

By the consent of the parties upon the argument, the court were furnished with the original will and the exhibits of handwriting used upon the trial of the case. The will had the appearance of a genuine instrument. * * * [After saying that the court were satisfied that there was sufficient corroborative evidence to establish the authenticity of the will, the learned Chief Judge continued thus] :

It is claimed by the contestant that the surrogate erred in permitting the proponents to show confirmatory declarations by John V. Onderdonk, made prior to the death of Hesdra, to support the authenticity of the will. It is undoubtedly the general rule that when a witness has been proved to have made contradictory statements, his evidence cannot be supported by proving that at other times he had made statements in harmony with his evidence. There are, however, well settled exceptions to the rule, and we think this case comes within them. (*Robb v. Hackley*, 23 Wend., 50.)

The head note to that case reads that "where the witness is charged with giving his testimony under the influence of some motive prompting him to make a false or colored statement, it may be shown that he made similar declarations at a time when the imputed motive did not exist. So in contradiction of evidence tending to show that the account of the transaction given by the witness is a fabrication of late date, it may be shown that the same account was given by him before its ultimate operation

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and effect arising from a change of circumstances could have been foreseen." This case has been frequently cited in the text writers and followed with approval by the courts of this state. (Greenl. on Ev., § 469; Whart. on Ev., § 570; *Dudley v. Bolles*, 24 Wend., 471; *Gilbert v. Sage*, 57 N. Y., 639; *Hotchkiss v. Germania Fire Ins. Co.*, 5 Hun., 90.)

In *Gilbert v. Sage* it is said that "as the aim of the cross-examination was to establish that so much of the conversation as was not detailed to defendant's counsel was an after thought and subsequent invention of the witness, it was proper to show in answer that the witness had previously told the same story. In *Hotchkiss v. Germania Fire Insurance Co.* it was said by MULLEN, J., that "statements made by a witness corroborating his evidence on the trial, made soon after the transaction to which it relates, or when he was not under the influence of any motive to relate the transaction untruthfully, are competent where it is shown that he had given a different relation of the occurrence, or that he had testified under the influence of a motive calculated to induce him to testify falsely."

In *Herrick v. Smith* (13 Hun, 446), the same doctrine was laid down, and evidence to show corroborative statements made by the witness at a time when the alleged motive to testify falsely did not exist were allowed.

The case of *Robb v. Hackley* was also approved by Judge MILLER in the case of *Railway Passenger Assurance Company v. Warner* (62 N. Y., 651). And see also *Wray v. Fedderke* (11 J. & S., 335).

The contestant's evidence tended to show that Onderdonk declared, after Hesdra's death, that he intended to fabricate a will for Hesdra. We think it was competent within the authorities to rebut this evidence by proof of his declarations during Hesdra's lifetime, that Hesdra had made a will.

All the judges concurred GRAY, J., in result.

Judgment affirmed.

NOTE.—In *Plyer v. German American Ins. Co.*, 121 N. Y., 689, it was held that statements of a witness (not a party) inconsistent with his testimony, and proved for the purpose of discrediting his testimony, have no effect as evidence of the facts mentioned in such statements.

Notes of Recent Cases on Showing Previous Statements, etc.

After a fire, the representative of an insurance company took the statements of men who were present at the fire, and had them reduced to writing and signed; and by these statements it appeared that there was not a watchman kept. The company then caused their testimony to be taken *de bene esse*, whereupon they testified that there was a watchman and he was on the premises; and this evidence was given on the trial. To discredit the witnesses defendant proved their first statements in writing, but gave no other evidence of the neglect to provide a watchman. — *Held*, that the contradictory statements thus proved did not avail as evidence to go to the jury that there was no watchman.

NOTES OF RECENT CASES ON SHOWING PREVIOUS STATEMENTS OR OTHER FACTS INCONSISTENT WITH PRESENT TESTIMONY.

Arkansas: Little Rock, etc., R. Co. v. Voss, 1892; 18 Southwest. Rep., 172 (where in an action for personal injuries defendant's witness on cross-examination testified that he did not make a certain statement to a third person on the morning of the accident, it is not error to allow plaintiff to contradict him by showing that he did make such statement, though the statement was not a part of the *res gestae*). *Florida*: Wood v. State, 1893; 12 Southern Rep., 539 (it is not error to refuse to permit a party, calling a witness to prove the contradictory statements of another witness, to lead such witness by reciting in the question the statement which he desires to prove). *Illinois*: Consolidated Ice Machine Co., v. Keifer, 134 Ill., 481; s. c. 25 Northeast. Rep., 799 (a witness may be impeached by showing that he testified differently in another proceeding, where a proper foundation has been laid therefor). *Indiana*: Huber v. State, 126 Ind., 185; s. c. 26 Northeast. Rep., 904 (where a witness in a prosecution for rape testified as to the cheerful manner with which the prosecutrix and accused went to the place where the offense was committed, the witness cannot be impeached by showing that she made statements derogatory to the character of the accused since such statements if made would not tend to contradict her testimony). *Iowa*: Hibbard v. Zenor, 82 Iowa, 505; s. c. 49 Northwest. Rep., 63 (where a witness' attention has been called to his own testimony on a former trial, the transcript of the shorthand notes of such testimony, which have been duly filed, are admissible in evidence to impeach him). *Massachusetts*: Commonwealth v. Harrington, 152 Mass., 488; s. c. 25 Northeast. Rep., 835 (where in a prosecution for larceny the defendant as a witness in his own behalf endeavored to explain the various suspicious circumstances attending his actions, it was *held* not error to allow the commonwealth to show that shortly after the commission of the crime, defendant testified in his own behalf in the district court and gave no such explanation as he had given on the trial). *Minnesota*: Bennet v. Syndicate Ins. Co., 43 Minn., 45; s. c. 44 Northwest Rep., 794 (where a proper foundation has been laid, a witness' testimony on a

former trial is admissible in evidence to impeach him). *Missouri*: *Spohm v. Mo. Pac. Ry. Co.*, 101 Mo., 417; s. c. 14 Southwest. Rep., 880 (a witness contradictory statements may be proved where a sufficient foundation has been laid); s. p. *Hamilton v. Rich Hill Coal Min. Co.*, 108 Mo., 364; s. c. 18 Southwest. Rep., 977. *New York*: *Morris v. Atlantic Ave. R. R. Co.*, 116 N. Y., 552; s. c. 22 Northeast. Rep., 1097 (although a witness' testimony in a previous proceeding may, where the statements contained therein are inconsistent with his present testimony, and a proper foundation has been laid therefor, be introduced in evidence for the purpose of affecting his credibility, yet where a witness on cross-examination admits that he made a statement referred to, it is error to permit another witness to contradict him in that respect by showing that he did not make the statement; the evidence being collateral matter brought out on cross-examination the party is concluded by the witness' answer). *Pennsylvania*: *Wilson v. Wilson*, 137 Pa. St., 269; 20 Atlantic Rep., 644 (it is error to exclude evidence of a witness' contradictory statement, where a proper foundation has been laid). *South Carolina*: *Sherard v. Richmond, etc. R. Co.*, 1892; 14 Southeast. Rep., 952 (a witness' former contradictory statements are admissible to impeach him). *Texas*: *Cross v. McKinney*, 81 Tex. 332; s. c. 16 Southwest. Rep., 1023 (a witness' written statement contradicting his testimony is admissible in evidence to impeach him where his attention has been first called to it). *United States*: *Chicago, etc. R. Co. v. Artery*, 137 U. S., 507; s. c. 11 Supm. Ct., 129 (a witness' contradictory statements to impeach him are not required to be proved by the person to whom they were made; and where they have been reduced to writing and signed by the witness sought to be impeached, the writing may be introduced in evidence where a proper foundation has been laid therefor). *Delaware, etc. R. Co. v. Converse*, 139 U. S., 469; s. c. 11 Supm. Ct., 569 (a witness may be impeached by proving that he made statements out of court inconsistent with his testimony). *Wisconsin*: *Waterman v. Chicago, etc., R. Co.* 82 Wis., 613; s. c. 52 Northwest. Rep., 247 (where a witness denied that he gave contradictory testimony on a former trial, the stenographer who took down the witness' testimony on the former trial may be called to show what the witness testified).

Alabama: *Holmes v. State*, 88 Ala., 26; s. c. 7 Southern Rep., 193 (where a witness testified on direct-examination that he never heard anything against defendant, he may be asked on cross-examination if he had not heard that the defendant "wore stripes" while working on the streets). *California*: *People v. Ah Lee Doon*, 97 Cal., 171; s. c. 31 Pacific Rep., 933 (it is proper upon cross-examination of a witness called to prove defendant's good disposition, to ask him if he had not heard of defendant's prior conviction for murder, and of his having drawn a pistol on different persons). *People v. Samonset*, 97 Cal., 448; s. c. 32 Pacific Rep., 520 (a witness' affidavit on a previous occasion, which tends to contradict his evidence in chief may be read on cross-examination). *Colorado*: *Cravans v. Bennett*, 17 Colo., 419; s. c. 30 Pacific Rep., 61 (a party who testifies in his own behalf is subject to cross-examination as to previous statements con-

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trary to his testimony the same as any other witness, though such declarations might have been introduced by the cross-examining party as a part of his own case). *Indiana*: *Randall v. State*, 132 Ind., 539; s. c. 32 Northeast. Rep., 305 (it is not abuse of discretion to permit a witness who has testified as to defendant's good character, to be cross-examined as to whether he had heard of certain previous acts of misconduct by defendant). *Michigan*: *People v. Cahoon*, 88 Mich., 456 (defendant's wife, as a witness, on cross-examination was asked whether she was present at all when the offense, concerning which she had testified, was committed, whether her husband had not written out her testimony for her and concocted the whole story.—*Held*, that such cross-examination was improper as merely tending to discredit the witness by *inuendo*). *Minnesota*: *Haye v. Chicago, etc., R. Co.*, 46 Minn., 269; s. c. 48 Northwest. Rep., 1117 (a witness may be cross-examined as to his previous statements conflicting with his present testimony). *Oregon*: *Krewson v. Purdon*, 13 Oreg., 563; s. c. 11 Pacific Rep., 281 (it is competent on cross-examination to ask a witness whether at a particular time and place he had not made certain specified statements in order to lay a foundation to impeach him). *Pennsylvania*: *Commonwealth v. Mosier*, 135 Pa. St., 221; s. c. 19 Atlantic Rep., 943 (upon a criminal prosecution for adultery, defendant as a witness testified that he had never committed adultery with the women named in the indictment.—*Held*, that it was proper to ask such witness on cross-examination whether he had not pleaded guilty to the commission of such an offense with her in another state).

I. *Foundation for contradictory oral statements.*

Arkansas: *Billings v. State*, 52 Ark., 303; s. c. 12 Southwest. Rep., 274 (a witness' contradictory statements may be proved to discredit him, though on cross-examination on being asked whether he had made the statement he did not deny it but stated that he did not remember). *California*: *Young v. Brady*, 94 Cal., 128; s. c. 29 Pacific Rep., 489 (a witness cannot be impeached by proof of his contradictory statements where no foundation has been laid therefor); s. p. *Salle v. Mayer*, 91 Cal., 165; s. c. 27 Pacific Rep., 513). *Colorado*: *Rose v. Otis*, 18 Colo., 59; s. c. 31 Pacific Rep., 493 (where witness is a party his statements contradicting his testimony are competent as substantive evidence as well as for impeaching his testimony, and it is not necessary that he should first be examined in reference to such statements, since in rebuttal he will have full opportunity to testify in regard to them). *Georgia*: (A defendant in a criminal case who testifies in his own behalf may be impeached by proof of contradictory statements without having been first examined in reference thereto.) *Christian v. Columbus, etc. R. Co.*, 70 Ga., 124; s. c. 15 Southeast. Rep., 701 (where on cross-examination a witness does not deny that he has made statements contradictory to his testimony, but professes only to remember a part of what he said, his statements may be shown by another witness). *Illinois*: *Aneals v. People*, 134 Ill., 401; s. c. 25 Northeast. Rep., 1022 (con-

contradictory statements cannot be proved to impeach a witness, where the witness has not been first examined in respect to them). *Reid v. Foster*, 37 Ill., App., 76 (it is not reversible error to allow a witness to be impeached by proof of his contradictory statements without having first laid a foundation therefor, where the witness sought to be impeached was subsequently recalled in rebuttal and gave his version of what was said). *Quincy Horse Ry, etc., Co. v. Gnuse*, 137 Ill., 264; s. c. 27 Northeast. Rep., 190 (where witness on cross-examination was asked whether he had made certain contradictory statements shortly after a former trial, it was held error to allow it to be shown that he made such statements shortly before said trial). *Indiana: Jackson v. Swope*, 1893, 33 Northeast. Rep., 909 (where the foundation for the impeachment of a witness not a party is limited as to statements made at a certain time it is not competent to prove statements made at any other time). *Louisiana: State v. Jones*, 44 La. Ann., 960; s. c. 11 Southern Rep., 596 (where a witness on cross-examination denied having had a conversation with a specified person at a specified time and place.—*Held*, that his denial was traversible by proof that he did have such conversation, but it could not be made the basis for evidence as to witness' particular declarations to which his attention had not been called). *Massachusetts: Parkenson v. Bemis*, 153 Mass., 280; s. c. 26 Northeast. Rep., 854 (where on cross-examination a witness was asked whether he made a specified statement it was held a harmless error to permit the impeaching witness to be asked generally what conversation he had had with the first witness, where the answer was confined to the matter referred to on the cross-examination). *Michigan: Koehler v. Buhl*, 94 Mich., 496; s. c. 54 Northwest. Rep., 157 (where a witness on cross-examination on being asked if he had made a certain statement to a specified person denied it, but the time and place when and where such statement was made was not called to his attention,—*held* that the testimony of the person to whom the alleged statement was made that such statement had been made was properly excluded). *Minnesota: Granning v. Swenson*, 49 Minn., 381; s. c. 52 Northwest. Rep., 30 (a witness cannot be impeached by proving his contradictory statements unless his attention has been first called to them). *Mississippi: Bonnelly v. Bowen*, 70 Miss., 142; s. c. 11 Southern Rep., 791 (the impeaching witness should not be permitted to state generally all that occurred; his testimony should be confined to such matters as were called to the attention of the witness sought to be impeached). *Missouri: Mahaney v. St. Louis, etc., R. Co.*, 108 Mo., 191; s. c. 18 Southwest. Rep., 895 (in laying the foundation for the impeachment of a witness, he was asked as to his statements to Henry W., but whose real name was Harry W.—*Held*, that the variation in the name was immaterial, as the witness knew who was intended, and it was error to exclude evidence as to the statements made to the person designated). *Nebraska: Hanscom v. Burmood*, 35 Neb., 504; s. c. 53 Northwest. Rep., 371 (contradictory statements cannot be proved to impeach a witness where his attention has not been first called thereto); *S. P. Bartlett v. Cheesebrough*, 32 Neb., 339; s. c. 49 Northwest. Rep., 360;

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Wood River Bank *v.* Kelley, 29 Neb., 590; s. c., 46 Northwest. Rep., 86 (on calling a witness' attention to his contradictory statements, the time when he made them should be designated within a few days or weeks; an offer to prove declarations of the witness made some time during the summer of a specified year is too indefinite). *New York*: McCulloch *v.* Dobbson, 133 N. Y., 114 (a witness may not be impeached by proof of declarations made out of court without his having been first examined in relation thereto). Meyer *v.* Campbell, 20 N. Y. Supp., 705; s. c. 48 State Rep., 662; 1 Misc. R., 283 (the rule requiring the laying of a foundation for the introduction of evidence of contradictory statements to impeach a witness, has no application where the witness is a party to the action; his contradictory declarations are admissible as declarations against interest). *Texas*: Levy *v.* State, 28 Tex. App., 203; s. c. 12 Southwest. Rep., 596 (a witness who testifies on cross-examination that he has no recollection of having made contradictory statements, may be impeached by proof that he did make such statements); s. p. Fuller *v.* State, 30 Tex. App., 559; s. c. 17 Southwest. Rep., 559; Edwards *v.* Osmon, 1892, 19 *id.*, 868; Smith *v.* State, Tex. App. 1893, 20 *id.*, 554. *Wisconsin*: Heddles *v.* Chicago, etc., R. Co., 77 Wis., 228, s. c. 46 Northwest. Rep., 115 (where a witness testifies on cross-examination that he does not recollect having made contradictory statements, they may be shown by other evidence). Perkins *v.* State, 1891, 47 Northwest. Rep., 327 (a witness may be recalled for further cross-examination as to contradictory statements made out of court to lay a foundation for his impeachment; and the party so calling him should not be obliged to make the witness his own and thus be deprived of his right to impeach him). Hunter *v.* Gibbs, 1891, 48 *id.*, 257 (the admissions of a party against interest may be shown without first laying a foundation as for impeachment).

II. *Foundation for contradictory written statements*

Alabama: Cooper *v.* State, 90 Ala., 641; 8 Southern Rep., 821 (a note written by a witness is not admissible to impeach him unless his attention is first called to it). *Georgia*: Georgia R., etc. Co. *v.* Smith, 85 Ga., 530; s. c. 11 Southeast. Rep., 859 (a written "brief" of a witness' evidence on a former trial is inadmissible for the purpose of contradicting him where no foundation has been laid therefor; such writing is not made by witness and is not within the provision of the Ga. Code dispensing with the preliminary examination of the witness sought to be impeached where his statements are in writing). *Illinois*: Western, etc., Ins. Co. *vs.* Broughton, 136 Ill., 317; s. c. 26 Northeast. Rep., 591 (a letter which witness acknowledged on cross-examination to be in his handwriting, was held admissible in rebuttal to impeach him). Perishable Freight Trans. Co. *v.* O'Neill, 41 Ill. App., 423 (where a witness was not asked whether he had written a letter purporting to have been signed by him, it was held inadmissible in evidence for the purpose of discrediting his testimony). *Louisiana*: State *v.* Callegari, 41 L. Ann., 578; s. c. 7 Southern Rep., 130

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(on cross-examination a witness was asked as to what he had testified on the preliminary examination of the accused, which had been reduced to writing, but the writing was not shown or read to the witness.—*Held*, that it was not error to exclude it when offered in evidence to impeach the witness). *Minnesota*: *Hammond v. Dike*, 42 Minn., 273; s. c. 44 North-west. Rep., 61 (where it is sought to impeach a witness by proof of his written contradictory statements a foundation should be laid therefor by first directing the witness' attention to such statements and giving him an opportunity to explain). *New York*: *Doud v. Donnelly*, 12 N. Y. Supp., 396; s. c. 35 State Rep., 834 (the rule that a witness' attention must be first called to contradictory statements before they can be proved to impeach him has no application where the statements sought to be proved are written); s. p. *Root v. Borst*, 20 N. Y. Supp., 189; *Oderkirk v. Fargo*, 61 Hun, 418; s. c. 16 N. Y. Supp., 220 (on the trial of an action on appeal from a justice's court a witness may be asked on cross-examination whether he will swear that he did not testify before the justice contrary to his present testimony in chief, without producing and reading the minutes of the justice's court or examining the witness from them). *Texas*: *Dooley v. Miller*, Civ. App., 1893, 21 Southwest. Rep., 157 (where a witness on cross-examination first denied that he wrote a letter contradicting his testimony, but subsequently, on being shown the letter, admitted that he wrote it,—*held*, that the letter might be received in evidence to impeach him). *United States*: *Chicago, etc., R. Co. v. Artery*, 137 U. S., 507; s. c. 11 Supm. Ct., 129 (a foundation should be laid for written as well as oral contradictory statements of a witness; and where a writing containing such statements, which purports to be signed by the witness is handed to him so that he may read it if he chooses and he admits the signature, and the party calling him does not request to have the writing read, it is error not to allow the witness to be examined as to its contents for the purpose of laying a foundation for its introduction in evidence to impeach him and to subsequently exclude it when offered for such purpose). *Toplitz v. Hedden*, 146 U. S., 252 (a witness may be examined as to what he testified to in another suit for the purpose of impeaching him without producing the record).

III. *Absent witness.*

Alabama: *Pruitt v. State*, 1891, 9 Southern Rep., 406 (where the testimony of an absent witness on a former trial has been introduced in evidence it is not competent to prove that the absent witness made statements contradicting what he testified to on the former trial; the witness not having been interrogated as to them). *Illinois*: *North Chicago St. Ry. Co. v. Cottingham*, 44 Ill. App., 46 (where to avoid a continuance a party admits what an absent witness would testify to, it is error to admit a letter of the absent witness for the purpose of impeaching his testimony). *Indiana*: *Eppert v. Hall*, 133 Ind., 417; s. c. 31 Northeast. Rep., 74 (where a deposition is read in evidence the deponent cannot be impeached

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by introducing a former deposition by the same witness unless a proper foundation has been laid therefor; the death of the witness does not alter the rule). *Pennsylvania*: *Patterson v. Dushane*, 137 Pa. St., 23; s. c. 20 Atlantic Rep., 538 (where a deposition of a deceased person has been read in evidence it is competent for the purpose of effecting his credibility to show that he had declared after the deposition was taken that he was mistaken in his testimony, though if he was living, he must have been first called and asked whether he made such declaration). *United States*: *Avers v. Watson*, 132 U. S., 394; s. c. 10 Supm. Ct., 116 (where the record of the testimony on a former trial of a witness since deceased is introduced in evidence, the former declarations of such witness whether by deposition or otherwise contradicting his testimony are inadmissible to impeach him).

IV. *Contradicting as to want of memory.*

In *Elmer v. Fessenden*, 154 Mass., 427; s. c. 28 Northeast. Rep., 299, it was held, in an action for slander, where a witness testified that a certain act occurred after the slander, but she could not remember the date when the slanderous words were spoken, that it was competent to contradict the witness by showing that on a former trial the witness testified that the act occurred after the slander. The court say: If the former testimony had been given the day before, under circumstances of great solemnity, no one would doubt that it tended to contradict her [the witness'] denial of recollection a day later. On the other hand, as suggested by the counsel for defendant, the fact that a person recited a date at school hardly tends to contradict his statement in middle life that he does not remember. Where the line should be drawn must depend upon circumstances and must be left largely to the discretion of the presiding judge.

V. *Sustaining witness impeached by evidence of previous inconsistent statement.*

Alabama: *Phoenix Ins. Co. v. Copeland*, 86 Ala., 551; s. c. 6 Southern Rep., 143 (a witness may deny contradictory statements or acts which have been shown to impeach him, though the matter be immaterial or collateral, but the testimony of other witnesses to sustain him as to such collateral matters should not be received). *California*: *Mason v. Vestal*, 88 Cal., 396; s. c. 26 Pacific Rep., 213 (where a witness has been impeached by showing his bad character for truth and his statements inconsistent with his testimony, the party calling the witness cannot sustain him by proof that he made statements consistent with his testimony at a time so far remote as to preclude the idea of fabrication). *Colorado*: *Conner v. People*, 1893, 33 Pacific Rep., 159 (where a witness' testimony has been impeached by showing contradictory statements before trial, it cannot be sustained by showing that at other times the witness made corroborating statements); s. p. *Davis v. Graham*, 1892, 29 *id.*, 1007. *Indiana*: *Hobbs v.*

XII. *Impeachment.* (4) Previous Inconsistent Statements. 747

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State, 133 Ind., 404; s. c. 32 Northeast. Rep., 1019 (where a witness has been impeached by testimony that he made statements contrary to his evidence, the party who called him may prove in rebuttal by the witness himself, or by other witnesses, that the witness on other occasions had related the facts as he gave them in evidence); s. p. *Ramey v. State*, 127 Ind., 243; s. c. 26 Northeast. Rep., 818. *Iowa*: *Hoover v. Cary*, 1892, 53 Northwest. Rep., 415 (where evidence is introduced to contradict a witness' denial on cross-examination that he made certain statements, the witness may be recalled to give his version of the conversation in which the statements are alleged to have been made). *Louisiana*: *State v. Claire*, 41 La. Ann., 1067; s. c. 6 Southern Rep., 806 (a witness who has been sought to be impeached by proof of contradictory statements may testify in rebuttal as to the new matter brought out in the attempt to impeach him, where he has not testified on the subject when examined in chief). *Maryland*: *Mallonee v. Duff*, 72 Md., 283; s. c. 19 Atlantic Rep., 708 (where a witness has been contradicted, his declarations corroborating his testimony are admissible to support his credibility). *Massachusetts*: *Hewitt v. Corey*, 150 Mass., 445; s. c. 23 Northeast. Rep., 223 (in an action by a married woman for the conversion of a horse attached as her husband's property, the husband testified that he did not own the horse. On cross-examination he admitted that the horse was included in a chattel mortgage made by him, but added, without objection, that he did not know the horse had been included at the time he signed the mortgage, and that he subsequently told the mortgagee that the horse was not his and ought not to be in the mortgage. The mortgagee was allowed to testify in corroboration that the husband had told him so.—*Held* that the latter testimony was competent). *Loomis v. N. Y., New Haven, etc., R. Co.*, 1893, 34 Northeast. Rep., 82 (an affidavit made by a witness as to the same matter concerning which he testified is not admissible to corroborate his testimony). *Mississippi*: *Archer v. Helm*, 70 Miss., 874; s. c. 12 Southern Rep., 702 (where defendant, as a witness, makes certain denials and, after plaintiff's evidence contradicting him is closed, defendant is again called, not to explain or distinguish his denial, but to merely repeat it, it is not error to reject his further testimony). *Missouri*: *State v. Whelehon*, 102 Mo., 17; s. c. 14 Southwest. Rep., 730 (it seems that a party whose witness has been impeached by proof of contradictory statements may corroborate him by giving evidence of other declarations of the witness consistent with his testimony). *State v. Reed*, 89 Mo., 168; s. c. 1 Southwest. Rep., 225 (where a witness has been impeached by proof of his contradictory statements, upon rebuttal he may be recalled to give his version of the conversation in which the alleged contradictory statements were made). *North Carolina*: *State v. Jacobs*, 107 N. C., 873; s. c. 12 Southeast. Rep., 248 (a witness whose credibility has been assailed by proof of contradictory statements may be corroborated by evidence of prior consistent declarations); s. p. *State v. Morton*, 107 N. C., 890; s. c. 12 Southeast. Rep., 112; *State v. McKinney*, 111 N. C., 683; s. c. 16 Southeast. Rep., 235. *Texas*: *Bell v. State*, Tex. Ct. App., 1892, 20 Southwest. Rep., 362 (where upon

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the trial of an indictment for robbery the prosecuting witness was impeached by proof that he had stated out of court that he did not know who robbed, *held* that it was competent for the state to give evidence that the witness made such statement in the defendant's presence, and after the defendant had gone the witness had said that he was done up by defendant). *Gibbs v. State*, Tex. Crim. App., 1892, 20 *id.*, 919 (where a witness has been impeached by proof of his contradictory statements made while testifying on a former trial, the judge who presided at the trial may be called to show that the witness, because of his unfamiliarity with the English language, found it difficult to understand some of the questions put to him).

Dollner v. Lintz, 84 N. Y., 669.

DOLLNER v. LINTZ.

New York Court of Appeals, 1881.

[Reported in 84 N. Y., 669.]

Proof of bad reputation for truth and veracity need not be confined to the precise point of time; but testimony to present bad reputation, may, in the discretion of the trial judge, be received to impeach veracity at the time of making a deposition previously.

William Lintz was sued as the maker of a promissory note of which the plaintiffs were the holders, and in his answer, he denied that the note was ever made by him.

It appears that the defendant had for several years lent notes to one Eneas, for his accommodation, and that on or about October 21, 1876, defendant made and lent to Eneas, for his accommodation, a note for \$2,210, which fell due on February 23d, 1877.

Eneas absconded before the note fell due, and defendant, just before and immediately after such absconding, discovered that Eneas had committed numerous forgeries.

Upon the trial, in February, 1879, the plaintiffs sought to prove what Eneas, the payee of the note, said to the plaintiffs when he transferred the note to them, and for this purpose his testimony, taken upon commission in September, 1877, was read in evidence.

The defendants, to impeach Eneas, called several witnesses, among them, one Henderson, who was asked: "Do you know what his reputation is for truth and veracity?"

Objected to on the ground that the question is directed to the reputation of Eneas for truth and veracity at the present time, and not to his reputation at the time he testified under the commission in September, 1877.

Objection overruled and exception taken.

A. "He is a person, who seldom, if ever, kept his engagements. In my knowledge, his reputation was bad. It was bad during the year 1877; his general reputation was bad ever since I have known him, and that is for the last fifteen years. From what I know of his reputation for truth and veracity, I would not believe him under oath."

Defendant recovered.

Conley v. Meeker, 85 N. Y., 618.

The Court of Common Pleas at General Term affirmed the judgment, saying: If there were any rule that a witness could be impeached only by showing his character to be bad at the moment he is testifying, still the question would have been perfectly competent. Eneas became a witness in the cause, not when his deposition was taken, but when it was read upon the trial. If, at the time of the trial, or at any previous time, the witness' character has been pronounced bad by his neighbors, the fact may be proved. *Graham v. Chrystal*, 2 Abb. Ct. App. Dec., 263; *Sleeper v. Van Middlesworth*, 4 Denio, 431.

But the character of Eneas in 1877 was fully proven by the witnesses, and the plaintiffs have nothing to complain of on that score.

The Court of Appeals affirmed the judgment.

ANDREWS, J. [*on this point, said*]: The exception is not tenable for several reasons: First. General reputation is not usually the growth of a day or month, but results in most cases from a course of life or conduct for a period of time. Proof that the reputation of a witness is now bad, might justify the jury, in the absence of countervailing evidence, in inferring, within reasonable limits as to time, that it was bad before the day of the trial. The trial judge may control the range of the inquiry, and it would be for the jury to determine, upon all the circumstances, as to the weight of the evidence. Second. But another conclusive answer to the exception is, that the witness Henderson, in reply to the question, referred to the reputation of Eneas at and before the time of his examination on commission, and said that his reputation was bad ever since he had known him.

CONLEY v. MEEKER.

New York Court of Appeals, 1881.

[Reported in 85 N. Y., 618.]

For impeaching the character of a witness, specific acts cannot be proven against him by other witnesses.

An action for six months use of a barge, owned by plaintiff and one Johnson.

Upon the trial Johnson was called as a witness for plaintiff and gave material testimony to sustain plaintiff's case, and on cross-examination, he said: "I did not serve three years in the State Prison; I served one term; I was first convicted in 1857.

Q. [By Defendant's Counsel] That was for the larceny of a set of false teeth from a woman? A. It was grand larceny.

Q. Was this the indictment under which you were convicted (offering to read)?

Objected to. Objection sustained and exception taken.

A. I was also convicted in March, 1860. It was the second conviction. That was for passing counterfeit money. I served my term under that conviction.

Re-examined :

I was pardoned under the first conviction. I was in State Prison nearly twelve months, before I received a pardon. I was restored to citizenship on both occasions. I am, and have been a member of the Baptist Church for several years. I am in my forty-third year.

Q. You have been carrying on, for the last seventeen years, a legitimate business? A. Ever since the 14th of May, 1864, I have been as honest a man as ever the sun shone upon.

Defendant then called Captain Abner Rowley as a witness and he testified that he had known Johnson a good while; he was then asked: Did you ever see him gamble?

Objected to by plaintiff's counsel.

Defendant's Counsel: We offer to show that he has been connected with gambling-houses, running them as professional gambling-houses, during the time he professes to have been a reformed man.

Objection sustained and exception taken."

Plaintiff recovered a verdict.

The Supreme Court at General Term affirmed the judgment.

GILBERT, J., saying: The questions whether the witness Johnson had been connected with gambling-houses, and whether he had acted like a Christian man, were wholly irrelevant to the issue. Nor were they rendered admissible by the statement of

Commonwealth v. Ingraham, 7 Gray, 46.

the witness, which was given without objection, that he was, and for several years had been, a member of the Baptist church, or his other statement, not responsive to the question put, that he had been since May 14, 1864, as honest a man as the sun ever shone upon. No objection was taken to the latter question or the answer thereto. The trial of a case cannot be controlled by the improper conduct of witnesses, or by improper answers volunteered by them.

The Court of Appeals affirmed the judgment, holding, on this point, that for impeaching the character of a witness, specific acts cannot be proven against him by other witnesses.

COMMONWEALTH v. INGRAHAM.

Massachusetts Supreme Court, 1856.

[Reported in 7 Gray, 46.]

If any inquiries are made of witness as to the truth and veracity of a witness of the other party, even though the answers are favorable rather than unfavorable, that party may call witnesses to prove the good character of his witness for truth and veracity.

DEWEY, J. [*after disposing of another point*]: The further question is as to the competency of the evidence introduced by the government to sustain Hiram Whitney's character for truth and veracity.

It is well settled that such evidence is not competent where there has been no attempt by the opposing party to impeach the character of the witness in this respect. In the absence of such attempted impeachment, the witness is to have the benefit of the ordinary presumption in that respect, and to rest there. But if his general reputation has been impeached by evidence on the part of the opposite party, it is then competent to introduce evidence in support of the character of the witness. This is not controverted by the defendants, but it is insisted that there had been no such impeachment of the character of the witness as would justify calling witnesses to sustain the same.

It is found, in this case, that the defendants had propounded

several questions to a witness on the stand, as to the general character of Hiram Whitney for truth and veracity, and that the witness had answered such inquiries. The answers, it is true, were apparently favorable to the reputation of Whitney, and it is upon this ground that the defendants now insist that it was not competent for the government in reply to call witnesses to sustain his character.

In the present case, it may be that the language of the witness was so unequivocal as to leave but one inference to be drawn from the answer, and that entirely favorable. But it is to be borne in mind that the interrogatory and the answer are matters occurring before the jury, and that in the manner in which the answer is given, though in language apparently favorable to the witness, yet there might be conveyed the impression of doubt and uncertainty as to his reputation. To give effect to the view now urged by the defendants would necessarily devolve upon the court in each case to judge of the effect of any particular testimony put into the case by the party attempting an impeachment, and whether it was successful or otherwise, inasmuch as in the latter case it would be the duty of the court to exclude all evidence offered by the party calling him to sustain his good character. Great practical difficulties would result from this course, as will be readily perceived.

In the view we take of this matter, any inquiries of witnesses by one party, as to the general reputation for truth and veracity of a witness introduced by the other party, are to be considered as an impeachment of the general character of the witness, so far as to open that subject to the introduction of evidence to sustain his good character. The attempt thus made to impeach may prove wholly abortive, as it often does, upon evidence apparently more unfavorable. But if the party against whom the witness is called is not content to leave the credit of the witness to be judged of by his appearance on the stand, the testimony he gives, and the contradictory testimony that may be offered, but opens another ground of impeachment, and voluntarily enters upon the same before the jury by inquiries pertinent to that issue, he cannot, because he finds that he has been unsuccessful, limit the inquiry to the witnesses to whom he has propounded

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interrogatories. It is open to the other party in such case to sustain the reputation of his witness in the usual form of calling witnesses to testify to his good character as a man of truth and veracity.

Exceptions overruled.

NOTE OF RECENT CASES TO PROVE CHARACTER.

Arkansas: Hollingsworth v. State, 53 Ark., 387; s. c. 14 Southwest Rep., 41 (proof of witness' general bad reputation cannot be rebutted by showing that such reputation was not deserved). *Florida*: Saussy v. South Florida R. Co., 22 Fla., 327 (the mere contradiction of a witness furnishes no ground for admitting evidence of character to sustain him). *Georgia*: Travelers' Ins. Co. v. Sheppard, 85 Ga., 751; s. c. 12 Southeast Rep., 18 (evidence of a witness' good character is inadmissible where her character has not been impeached). Surles v. State, 89 Ga., 167; s. c. 15 Southeast Rep., 38 (where a witness as to another witness' general bad character stated that he based his opinion on a certain transaction of the impeached witness, the latter cannot be sustained by evidence explaining the transaction). *Illinois*: Chicago, etc. R. Co. v. Fisher, 31 Ill. App., 36 (where a witness has been merely contradicted, evidence of his general character is inadmissible to sustain him). Magee v. People, 139 Ill., 138; 28 Northeast Rep., 1077 (defendant in a criminal case testified as a witness and the state gave evidence of his bad reputation; defendant then called witnesses, who testified that they knew him and never heard anything against him.—*Held*, that defendant's evidence did not tend to rebut the state's evidence, and that the court did not err in refusing to instruct the jury to take it into consideration). *Indiana*: Diffenderfer v. Scott, 5 Ind. App., 243; s. c. 32 Northeast Rep., 87 (a witness who is contradicted by other evidence upon a direct issue in the case cannot be supported by proof of good character, even though the contradiction imputes moral turpitude or the commission of a crime). *Kentucky*: Carter v. Commonwealth, 1890, 13 Southwest Rep., 921 (where on cross-examination the witness is shown to have been a prostitute, the party calling her may show her reformation). *Louisiana*: State v. Fruge, 44 La. Ann., 165; s. c. 10 Southern Rep., 621 (the state may offer evidence of the good reputation for truthfulness of its own witness where his veracity is attacked by defendant on cross-examination). *Texas*: Tipton v. State, 30 Tex. App., 530; s. c., 17 Southwest Rep., 1097 (where a witness has been impeached by proof of his contradictory statements it is permissible to support him by proof of general good character for veracity). *Vermont*: Stevenson v. Gunning, 64 Vt., 601; s. c. 25 Atlantic Rep., 697 (where a witness' testimony has only been contradicted by other testimony, evidence of the witness' good reputation for truth is inadmissible).

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